(10)

No. 01-595-CFY Title: United States, Petitioner
v.
Angela Ruiz

Docketed: October 9, 2001 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Aug 24 2001	Application (01A168) to extend the time to file a petition for a writ of certiorari from September 9, 2001 to October 10, 2001, submitted to Justice O'Connor.
	Aug 29 2001	Application (01A168) granted by Justice O'Connor extending the time to file until October 9, 2001.
	Oct 9 2001	Petition for writ of certiorari filed. (Response due December 7, 2001)
	Nov 13 2001	Order extending time to file response to petition until December 7, 2001.
	Dec 7 2001	Brief of respondent Angela Ruiz in opposition filed.
	Dec 7 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Dec 12 2001	DISTRIBUTED for Conference of January 4, 2002
	Dec 21 2001	Reply brief of petitioner United States filed.
	Jan 4 2002	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jan 4 2002	Petition GRANTED. SET FOR ARGUMENT April 24, 2002. **********
	Jan 22 2002	Motion of respondent for appointment of counsel filed.
	Jan 30 2002	Motion DISTRIBUTED. February 15, 2002 (Page 38)
	Feb 19 2002	Motion for appointment of counsel GRANTED and it is ordered that Steven F. Hubachek, Esquire, of San Diego, California, is appointed to serve as counsel for the respondent in this case.
	Feb 19 2002	Joint appendix filed.
	Feb 19 2002	Brief of petitioner United States filed.
	Feb 19 2002	Brief amici curiae of Ohio, et al. filed.
	Mar 15 2002	Record filed.
	Mar 20 2002	CIRCULATED.
	Mar 21 2002	Brief amicus curiae of Natl.Association of Criminal Defense Lawyers, et al. filed.
	Mar 21 2002	Brief of respondent Angela Ruiz filed.
	Apr 17 2002	Reply brief of petitioner United States filed.
	Apr 24 2002	ARGUED.

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Supreme Court, U.S.
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No

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED

1. Whether before pleading guilty, a criminal defendant has a constitutional right to obtain exculpatory information, including impeachment material, from the government.

2. If so, whether that right may be waived through a plea agreement.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 241 F.3d 1157.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2001. A petition for rehearing was denied on June 11, 2001 (App., *infra*, 40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment provides in pertinent part that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law."

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Southern District of California on one count of importing marijuana, in violation of 21 U.S.C. 952 and 960. C.A. E.R. 60. Respondent was sentenced to 18 months' imprisonment, to be followed by three years of supervised release. *Id.* at 61-62. The court of appeals vacated respondent's sentence and remanded for resentencing. App., *infra*, 21a.

1. On August 13, 1999, respondent entered the United States from Mexico through the port of entry at Tecate, California C.A. E.R. 2. A search of respondent's car uncovered approximately 66.3 pounds of marijuana concealed within it. *Ibid.* Respondent was arrested and transported to the Metropolitan Correctional Center. *Ibid.*

The United States Attorney for the Southern District of California offered respondent an opportunity to enter into a "fast-track" plea agreement. C.A. E.R. 6-7. Under the Southern District of California's standard fast-track agreement, a defendant agrees to waive indictment, plead guilty to an information, and waive appellate rights. Gov't C.A. Reh'g Pet., Exh. B. In addition, the standard fast-track agreement contains a provision in which the government represents that it has provided the defendant with any information in its possession that establishes the defendant's factual innocence, and the defendant waives the right to receive

any information that would impeach government witnesses or support an affirmative defense. App., *infra*, 46a. The waiver provision of the agreement specifically states that:

> The Government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The Government understands it has a continuing duty to provide such information establishing the factual innocence of the defendant.
>
> The defendant understands that if this case proceeded to trial, the Government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the Government would be required to provide information in its possession that supports such a defense. In return for the Government's promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information.

Id. at 45a-46a. In return for the defendant's commitments, the government agrees to recommend a two-level downward departure from the offense level specified by the Sentencing Guidelines. *Ibid.* Respondent declined the U.S. Attorney's offer to enter into a plea agreement. *Id.* at 2a.

2. A federal grand jury subsequently returned a two-count indictment charging respondent with importing marijuana, in violation of 21 U.S.C. 952 and 960, and possessing marijuana with the intent to distribute it, in

violation of 21 U.S.C. 841(a)(1). C.A. E.R. 1-2. Respondent pleaded guilty to the count charging her with importing marijuana. C.A. Supp. E.R. 1. At the hearing on her guilty plea, respondent stated that she understood the charge to which she was pleading guilty and the maximum penalty she faced. *Id.* at 2-3. She further stated that she had discussed the case with her attorney and that she was satisfied with his services. *Id.* at 3-4. After her attorney described her criminal conduct, respondent admitted that she drove a car containing approximately 30.1 kilograms of marijuana across the border and that she knew that there was marijuana in it. *Id.* at 4-5.

The Presentence Investigation Report determined that respondent's total offense level was 13 and that her criminal history category was III, yielding a Guidelines sentencing range of 18-24 months' imprisonment. See App., *infra*, 43a. Respondent sought a "fast-track" downward departure, asserting that she had done everything to qualify for such a departure except waive the right to receive information that would impeach government witnesses and support an affirmative defense. *Id.* at 41a-43a. She further argued that she had a constitutional right to receive such information under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972), and that the government had acted unconstitutionally in attempting to secure a waiver of that right. App., *infra*, 42a-43a. The government opposed a fast-track departure, on the ground that it had not received the benefits that accompany fast-track agreements. *Id.* at 42a. The district court refused to grant a downward departure and sentenced respondent to 18 months' imprisonment. *Id.* at 43a-44a.

3. A divided panel of the Ninth Circuit reversed and remanded for resentencing. App., *infra*, 1a-39a. As relevant here, the court held that a criminal defendant has a constitutional right to obtain *Brady* material, including impeachment information, before pleading guilty and that a defendant may not validly waive that right through a plea agreement. *Id.* at 8a-16a

The court of appeals first reaffirmed its holding in *Sanchez* v. *United States*, 50 F.3d 1448, 1453 (9th Cir. 1995), that a defendant has a constitutional right to obtain *Brady* information before pleading guilty. App., *infra*, 9a-10a. The precise holding of *Sanchez*, the court stated, is that "guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material [exculpatory] information withheld by the prosecution." *Id.* at 9a. The basis for that holding, the court explained, is that "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." *Id.* at 9a-10a.

The court of appeals next concluded that "[t]he rationale of *Sanchez* applies with equal force to plea agreements." App., *infra*, 10a. The court reasoned that "[t]he disclosure of *Brady* evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a guilty plea." *Ibid.* The court therefore concluded that "plea agreements, and any waiver of *Brady* rights contained therein, 'cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution.'" *Ibid.* The court rejected the view that a waiver is valid if limited to impeachment material bearing on the credibility of government witnesses. *Id.* at 13a-15a. Noting that this Court had rejected any distinction between impeachment material and other

exculpatory material under *Brady*, *id.* at 14a-15a, the court held that information favorable to the defense, including impeachment material, must be disclosed whenever it "would create a reasonable probability" that the defendant would reject a plea agreement or decide to go to trial rather than plead guilty. *Id.* at 15a.

Based on its holding that a waiver of *Brady* and *Giglio* rights is invalid, the court of appeals further held that "it is unconstitutional for prosecutors to withhold a departure recommendation based on a defendant's refusal to accept such a waiver." App., *infra*, 18a. The court also concluded that respondent had made a sufficient showing to warrant an evidentiary hearing on whether "the Government declined to recommend a 'fast track' departure because [respondent] refused to waive her *Brady* rights." *Id.* at 19a. The court remanded with directions to the district court to conduct such a hearing, and to determine in its discretion whether to remedy any violation it found. *Id.* at 20a.

Judge Tallman dissented. App., *infra*, 25a-39a. He concluded that the majority's rule "forces the government to turn over information to a defendant immediately upon beginning plea bargain negotiations, when that information will generally be of little use to the defendant unless she goes to trial." *Id.* at 38a. Judge Tallman also concluded that the majority's rule "harms the administration of justice" by interfering with the government's substantial interest in "maintaining the confidentiality of government witnesses and protecting ongoing investigations." *Ibid.* Judge Tallman also emphasized that the majority's rule prevents the expeditious resolution of drug courier cases because it requires prosecutors to engage in "the often time-consuming process of determining which witnesses it

may call at trial, what potential impeachment information on each witness is in its possession, and whether it must disclose that information to the defendant." *Id.* at 39a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has held that a criminal defendant has a constitutional right to obtain *Brady* material, including impeachment material, before pleading guilty. The court reasoned that disclosure of such information is essential to ensure a voluntary and intelligent plea. Based on the same analysis, the court held that a defendant may not waive the right to obtain *Brady* material in a plea agreement. Those holdings, if left in place, would effectuate a radical change in guilty plea practice in the federal system and would produce a variety of adverse consequences in the administration of federal criminal justice. Nothing in this Court's jurisprudence justifies the Ninth Circuit's holdings.

Brady and this Court's decisions applying it provide no support for the view that a defendant has a right to the production of exculpatory material before entering a valid guilty plea. Those decisions establish that a prosecutor has a duty to disclose exculpatory information to ensure that the defendant receives a fair trial. *Brady* does not require the government to assist a criminal defendant in making a strategic decision whether to plead guilty. Nor do this Court's decisions support the view that a defendant must have access to the government's files, including impeachment information relating to potential trial witnesses, in order to enter a voluntary and intelligent plea. This Court's decisions make clear that a defendant does not need to know the strength of the government's case in order to enter a voluntary and intelligent plea.

Even if *Brady*'s due process rule were extended to the guilty plea stage of a criminal proceeding, a defendant who pleads guilty could validly waive the right to obtain *Brady* material. This Court's decisions establish that a criminal defendant may waive most constitutional rights, and there is no reason to treat a newly created *Brady* right differently. Thus, the Ninth Circuit not only erred in holding that a defendant has a constitutional right to obtain *Brady* material before pleading guilty; it also erred in holding that such a right may not be waived.

If allowed to stand, the Ninth Circuit's decision would impose serious costs on the criminal justice system. It hampers the expeditious resolution of criminal cases through guilty pleas; it endangers prospective government witnesses and the conduct of ongoing investigations; and it intrudes on the strong interest in the finality of criminal convictions. Nor is the Ninth Circuit's rule necessary to ensure the fairness or reliability of a guilty plea. Except in the most unusual circumstances, once competent counsel explains the nature of a charge to a defendant, the defendant knows whether he has committed the charged offense. If such a defendant subsequently pleads guilty and admits commission of the offense in open court, there is no reason to question the reliability of the plea.

The Ninth Circuit stands alone in the extent of its imposition of *Brady* disclosure duties on the prosecution as a prerequisite to an intelligent plea. While several circuits have found that the non-disclosure of exculpatory material may in certain circumstances undermine the validity of a guilty plea, no circuit has agreed with the Ninth Circuit's conclusion that disclosure of *Brady* material is an indispensable component of a voluntary and intelligent plea. And the Fifth Circuit

has attacked the analysis used by the Ninth Circuit as inconsistent with this Court's decisions.

The criminal justice system has a pressing need for this Court's resolution of the questions whether *Brady* applies at the guilty plea phase of a criminal proceeding, and if so, whether such *Brady* rights may be waived. Because the vast majority of criminal cases in the federal system are resolved through guilty pleas, those questions have recurring national importance. Guidance from this Court is especially needed because, in general, it is not the practice of federal prosecutors to disclose impeachment information before a defendant pleads guilty. This Court's intervention is therefore warranted.

A. The Ninth Circuit's Position Conflicts With This Court's Decisions

1. The Ninth Circuit's holding that a criminal defendant has a constitutional right to obtain exculpatory information from the government before pleading guilty is unsupported by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the decisions applying it. Under those decisions, a prosecutor's duty to disclose exculpatory information arises only where disclosure is necessary to ensure a fair trial. *Brady* does not require the government to disclose information in its files in order to help a criminal defendant make a strategic decision about whether to plead guilty.

In *Brady*, this Court reviewed a claim that, because the prosecutor had withheld evidence of a co-defendant's confession, the defendant was constitutionally entitled to a new trial on the issue of guilt. The Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or

to punishment." 373 U.S. at 87. The principle supporting that holding, the Court explained, is "avoidance of an unfair trial to the accused." *Ibid.*

In subsequent cases, the Court has consistently limited *Brady* to the nondisclosure of exculpatory information that results in the denial of a fair trial. In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court emphasized as "a critical point" that "the prosecutor will not have violated his constitutional duty of disclosure [under *Brady*] unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* at 108. The Court further explained that, because "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt," a prosecutor's failure to disclose exculpatory evidence violates the constitution only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* at 112. The Court rejected as inconsistent with *Brady* a standard that would instead "focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial." *Id.* at 112 n.20.

Similarly, in *United States* v. *Bagley*, 473 U.S. 667, 675 (1985), the Court explained that the purpose of the *Brady* rule "is not to displace the adversary system," but to "ensure that a miscarriage of justice does not occur." For that reason, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Ibid.* (footnote omitted). Any broader right, the Court observed, "would entirely alter the character and balance of our present systems of criminal justice." *Id.* at 675 n.7. The Court also reiterated that "[c]onsistent with our overriding concern with the justice of the

finding of guilt, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 678 (citation and internal quotation marks omitted).

More recently, in *Kyles* v. *Whitley*, 514 U.S. 419, 436-437 (1995), the Court explained that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." A constitutional violation occurs only "when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* at 434. And in *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999), the Court observed that, while the phrase "*Brady* violation" is sometimes used loosely to refer to any failure by the prosecution to disclose exculpatory evidence, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."

The purpose of the Court's *Brady* decisions is therefore to protect the fairness of a verdict at trial, and to guard against the risk that an innocent person might be found guilty because the government withheld evidence. That risk does not exist when a defendant enters a plea in open court, thereby "admitting guilt of a substantive crime." *United States* v. *Broce*, 488 U.S. 563, 570 (1989). As the Fifth Circuit explained in *Matthew* v. *Johnson*, 201 F.3d 353, 360, cert. denied, 531 U.S. 830 (2000), "[t]he prosecutor's duty to disclose material exculpatory information * * * exists to ensure that the accused receives a fair trial." Since a *Brady* violation can be found only by assessing "the potential effects of undisclosed information on a judge's or jury's assessment of guilt, it follows that the failure

of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation." *Id.* at 361-362; see also *Orman* v. *Cain*, 228 F.3d 616, 617 (5th Cir. 2000) ("*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads guilty.").

2. The Ninth Circuit made no attempt to justify its disclosure rule by reference to *Brady* v. *Maryland* or the decisions applying it. Instead, it attempted to link its holding to a separate constitutional principle—that the Due Process Clause requires that a defendant's decision to plead guilty must be voluntary and intelligent. The court reasoned that "guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material [exculpatory] information withheld by the prosecution." App., *infra*, 9a.

a. That analysis conflicts with the decisions of this Court that address the elements of a voluntary and intelligent plea. In *Brady* v. *United States*, 397 U.S. 742 (1970), the Court held that a plea is deemed voluntary if it is not "induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (*e.g.* bribes)." *Id.* at 755 (internal quotation marks omitted). The Court held that a plea is intelligent when a defendant is "advised by competent counsel," is "aware of the nature of the charge against him" and "likely consequences" of the plea, and is not "incompetent or otherwise not in control of his mental faculties." *Id.* at 748, 756. The elements of a voluntary and intelligent plea set forth in *Brady* v. *United States* do not include

awareness of exculpatory information possessed by the government.

The Ninth Circuit added receipt of exculpatory information to the requirements for a voluntary and intelligent plea principally on the ground that "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." App., *infra*, 9a-10a. This Court recognized in *Brady* v. *United States* that a defendant's entry of a guilty plea often is influenced by the defendant's view of the strength of the prosecution's case. 397 U.S. at 756. But the Court went on to *reject* the contention that a defendant must be able to accurately assess the strength of the government's case in order to make a voluntary and intelligent plea. The Court stated that "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Id.* at 757. In particular, the Court explained, "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case." *Ibid.* "We find no requirement in the Constitution," the Court added, "that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." *Ibid.*

Likewise, in *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970), the Court held that "a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." *Id.* at 770. Instead, "[w]hether

a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends * * * on whether the advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 770-771. The Court emphasized that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," and that "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case." *Id.* at 769. See also *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973) (defendant may not attack his guilty plea on the ground that he was unaware at the time of the plea that his grand jury had been unconstitutionally selected, absent a showing that "the advice he received from counsel was not within the standards set forth in *McMann*"); *United States* v. *Broce*, 488 U.S. 563, 573 (1989) ("conscious waiver" is not required "with respect to each potential defense relinquished by a plea of guilty").

This Court's decisions therefore make clear that a defendant does not have to know the strength of the government's case in order to make a voluntary and intelligent plea. The Ninth Circuit's decision in this case is irreconcilable with those decisions.

b. The Ninth Circuit's reliance on a defendant's interest in knowing the strength of the government's case before pleading guilty is subject to a second fatal objection. If an understanding of the strength of the government's case were truly necessary in order to permit a defendant to make a voluntary and intelligent plea, disclosure of exculpatory information alone could not achieve that objective. A full understanding of the strength of the government's case can only be achieved through a disclosure of evidence that *inculpates* the

defendant as well. The logic of the Ninth Circuit's ruling would therefore require the government to disclose inculpatory as well as exculpatory evidence.

This Court, however, has emphatically rejected the proposition that the Due Process Clause requires the government to disclose inculpatory evidence to the defendant. See *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977); *Agurs*, 427 U.S. at 111 ("we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel"). Indeed, for precisely that reason, the Court in *Agurs* rejected the contention that materiality should be defined by the impact of undisclosed evidence on a defendant's ability to prepare for trial. The Court explained that a trial preparation standard "would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense." *Id.* at 112 n.20. The Ninth Circuit's rationale for its *Brady* ruling suffers from the same flaw.

3. Equally flawed is the court of appeals' holding that a defendant pleading guilty cannot waive his right to receive *Brady* material or, as in this case, the sub-set of *Brady* material involving impeachment of government witnesses, see *Giglio* v. *United States*, 405 U.S. 150 (1972). If a constitutional right to obtain *Brady* material before pleading guilty were created (with the definition of *Brady* material altered to turn on whether a different plea was reasonably probable if the information had been disclosed), the new right could not be rooted in the requirement that a plea must be voluntary and intelligent, because this Court's decisions rule out that analysis. See pp. 12-14, *supra*. Accordingly, if such a right were established, it would have to find its source in an expansion of the due process holding in

Brady itself, requiring the government to furnish exculpatory information to "protect a defendant's own decision making regarding the costs and benefits of pleading and of going to trial." *Matthew*, 201 F.3d at 362.

Under this Court's decisions, that right, like most other constitutional rights, would be subject to waiver. As this Court explained in *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995), "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." In particular, under this Court's cases, a defendant may waive the right to a double jeopardy defense, *Ricketts* v. *Adamson*, 483 U.S. 1, 10 (1987), the privilege against compulsory self-incrimination, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969), the right to a jury trial, *ibid.*, the right to confront one's accusers, *ibid*, and the right to counsel, *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938). There is nothing inherent in the right to obtain *Brady* material that would distinguish it from those other rights. If a defendant determines to plead guilty and is willing to waive his right to obtain whatever exculpatory information there happens to be in exchange for the possibility of a reduced sentence or other considerations, no sound basis exists to prevent him from doing so, particularly with respect to the subset of information relating not to substantive evidence of guilt, but to the credibility of government witnesses.

4. In sum, under this Court's decisions, a criminal defendant does not have a constitutional right to obtain *Brady* material before pleading guilty. But even if such a right were recognized based on an expansion of *Brady*, it would be subject to waiver through a plea

agreement. The court of appeals' contrary conclusions depart from principles in this Court's jurisprudence.

B. The Ninth Circuit's Ruling Imposes Serious Costs On the Criminal Justice System And Is Not Necessary To Ensure The Fairness And Reliability Of A Plea

This Court has observed that plea bargaining is "an essential component of the administration of justice." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971). Indeed, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Ibid.*

The Ninth Circuit's ruling significantly hampers the expeditious resolution of criminal cases through guilty pleas. If the government must routinely disclose *Brady* material (including witness impeachment material under *Giglio*) to every defendant before he pleads guilty, the time and resources devoted to a case before entry of a guilty plea would have to be substantially increased. That problem is especially acute because *Brady* and *Giglio* require the government to search the files of all members of the prosecution team. *Kyles*, 514 U.S. at 437. As Judge Tallman noted, in order to comply with the Ninth Circuit's decision, prosecutors would be required to engage in "the often time-consuming process of determining which witnesses it may call at trial, what potential impeachment information on each witness is in its possession, and whether it must disclose that information to the defendant." App., *infra*, 39a. That time-consuming and resource-intensive process would destroy a significant part of the value to the government that plea bargaining now affords. See *Brady* v. *United States*, 397

U.S. at 752 (a government interest supporting plea bargaining is that scarce judicial and prosecutorial resources are conserved for other cases).

As Judge Tallman noted, the Ninth Circuit's ruling also interferes with the government's interest in maintaining the confidentiality of its witnesses and protecting ongoing investigations. App., *infra*, 38a. This Court has recognized the "necessity of undercover work and the value it often is to effective law enforcement," as well as "the desirability and legality of continued secrecy even after arrest." *Weatherford*, 429 U.S. at 557. The Ninth Circuit's decision, however, would in some cases require the premature disclosure of confidential informants or cooperating co-defendants, needlessly disrupting ongoing investigations. The Ninth Circuit's ruling could also endanger the lives of some government witnesses. In response to the dangers that premature disclosure of government witnesses entails, Congress provided in the Jencks Act that "no statement" by a government witness "shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." 18 U.S.C. 3500(a). See *United States* v. *Presser*, 844 F.2d 1275, 1285 (6th Cir. 1988). The court of appeals' ruling effectively nullifies that protection in a set of cases.

The court of appeals' decision also intrudes on the interest in the finality of guilty pleas. It enables a defendant to attack his plea long after he has solemnly admitted his crime in open court. The essence of a defendant's *Brady* claim at that point is not that his solemn admissions of guilt were false. Instead, the claim is that, if the government had disclosed a particular piece of evidence, the defendant would have recalculated the risks and benefits of his options and opted to go to trial rather than pleading guilty. App., *infra*, 15a.

As this Court has recognized, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). "The impact is greatest," the Court has emphasized, "when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas." *Ibid.*; *Bousley* v. *United States*, 523 U.S. 614, 621 (1998) ("the concern with finality served by the limitation on collateral attacks has special force with respect to convictions based on guilty pleas"). An intrusion on finality is particularly problematic when there is no claim that "unfair procedures may have resulted in the conviction of an innocent defendant" (*Timmreck*, 441 U.S. at 784)—the situation that exists when a defendant has admitted his guilt in open court.

The Ninth Circuit's rule is unnecessary to ensure the fairness and accuracy of a guilty plea. Barring unusual circumstances, once competent counsel advises a defendant of the nature of the charges, the defendant can determine whether he is guilty of an offense. And once a defendant solemnly swears in open court that he has committed the offense, there is no reason to question the accuracy of the resulting entry of a finding of guilt. As this Court has explained, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam); see also *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption

of verity."); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are * * * unlikely to be driven to false self-condemnation.")

C. The Ninth Circuit's Application of *Brady* To Guilty Pleas Is Unique

While several courts of appeals have held that the failure to receive *Brady* material plays a role in deciding whether a guilty plea is valid, no court has adopted the Ninth Circuit's sweeping rule that disclosure of *Brady* material is an indispensable component of a voluntary and intelligent plea. And the Fifth Circuit, in the course of declining to adopt on habeas review a rule like the Ninth Circuit's, has repudiated the analytical premises of the decision in this case.

In *Miller* v. *Angliker*, 848 F.2d 1312, cert. denied, 488 U.S. 890 (1988), the Second Circuit held that receipt of *Brady* material does not affect whether a plea is voluntary and intelligent. The court explained that a plea is intelligent "if the accused had the advice of counsel and understood the consequences of his plea, even if only in a fairly rudimentary way," and that it is voluntary "if it is not the product of actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his options rationally." *Id.* at 1320. The court nonetheless concluded that "even a guilty plea that was 'knowing and intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." *Ibid.*

The Second Circuit's subsequent decision in *United States* v. *Avellino*, 136 F.3d 249 (1998), appears to confine the scope of the government's obligation to turn over *Brady* material before a defendant pleads guilty. There, the court held that, when the government is

ordered to turn over *Brady* material before trial, "its failure to do so may be a basis for vacating the guilty plea if the withheld evidence was material." *Id.* at 262. The court recognized, however, that "guilty pleas are entered in many cases even before discovery is produced." *Ibid.* The court also "express[ed] no view regarding when the government's obligation to disclose *Giglio* material might arise in other cases," and stated that "the government remains free to address the timing issue in a future case in which it fails to disclose evidence that is material in the *Brady* sense." *Ibid.*

In *Campbell* v. *Marshall*, 769 F.2d 314, 322 (1985), cert. denied, 475 U.S. 1048 (1986), the Sixth Circuit noted that "there is no authority within our knowledge holding that suppression of *Brady* material *prior to trial* amounts to a deprivation of due process." The court also concluded that, while the failure to receive *Brady* material is relevant in deciding whether a plea is voluntary and intelligent, that issue should be resolved "in light of all the attendant circumstances." *Id.* at 323. Under the Sixth Circuit's approach, whether or not a defendant receives *Brady* material, other factors, including the assistance of counsel, a plea-taking procedure that complies with *Boykin* v. *Alabama*, 395 U.S. 238 (1969), and a factual basis for the plea, can "go a long way toward" establishing the validity of a plea. 769 F.2d at 323-324. The Eighth Circuit has adopted the same approach as the Sixth. *White* v. *United States*, 858 F.2d 416, 422 (1988), cert. denied, 489 U.S. 1029 (1989).

In *United States* v. *Wright*, 43 F.3d 491, 496 (1994), the Tenth Circuit held that, "under certain limited circumstances," a prosecutor's failure to disclose exculpatory material "can render a defendant's plea involuntary." The court failed to provide any concrete guid-

ance, however, on when those limited circumstances might arise, and did not go as far as the Ninth Circuit did here in requiring *Brady* disclosure before the entry of *any* plea.

In contrast to those courts that have held that *Brady* has some relevance to the plea process, the Fifth Circuit, although not squarely resolving that constitutional issue, has indicated disagreement with the proposition that *Brady* disclosures must be made in order to ensure a valid guilty plea. See *Matthew* v. *Johnson*, 201 F.3d 353, cert. denied, 531 U.S. 830 (2000). There, a defendant sought to collaterally attack his guilty plea based on a claim that he had failed to receive *Brady* material before pleading guilty. The Fifth Circuit held that acceptance of the defendant's claim would require the creation of a new constitutional rule and that collateral relief was therefore unavailable under *Teague* v. *Lane*, 489 U.S. 288 (1989). Based on its review of this Court's decisions applying *Brady*, the Fifth Circuit concluded that "the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation." 201 F.3d at 361-362. The Fifth Circuit also attacked, as inconsistent with this Court's decisions in *Brady* v. *United States*, *supra*, and *McMann* v. *Richardson*, *supra*, the position that a defendant's awareness of *Brady* v. *Maryland* material is an indispensable component of a voluntary and intelligent plea. *Id.* at 368-369.

No federal circuit has gone as far as the court of appeals in this case in compelling disclosure of materials in the government's files in order for the defendant's counseled admission of guilt to be found valid. But that lack of uniformity in legal positions creates uncertainty about the obligations of prosecutors in the guilty plea process.

D. The Questions Presented Are Of Recurring Importance

The criminal justice system has a pressing need for this Court's intervention to resolve the questions whether a defendant has a right to obtain *Brady* material before pleading guilty, and, if so, whether that right may be waived. Approximately 95% of federal convictions are obtained by guilty plea, and approximately 85% of all criminal defendants in the federal system have their cases resolved through guilty pleas. *Judicial Business of the United States Courts, Annual Report of the Director* (2000), Table D-4 (*available at*: http://www.uscourts.gov/judbus2000/contents.html). The questions presented in this case are therefore ones of recurring importance to federal prosecutors throughout the country. Those questions are of particular importance in the Ninth Circuit where prosecutors are bound by the decision in this case. The Ninth Circuit accounts for approximately 22% of the criminal defendants in the federal system, and approximately 23% of the criminal defendants who plead guilty. *Id.* at Table D-7.

Guidance from this Court is especially needed, because, in general, and apart from the obligation to comply with Ninth Circuit decisions or discovery orders, it is not the practice of federal prosecutors to disclose information that could impeach government witnesses before a defendant pleads guilty. That practice reflects a general consensus that such disclosure could endanger government witnesses, disrupt ongoing investigations, and require a significant additional commitment of scarce resources to cases before entry of guilty pleas. The trial preparation that is required to uncover much impeachment often does not even occur until it is apparent that the defendant intends to

contest his guilt at a trial. By holding both that a defendant has a constitutional right to obtain all *Brady* material at the guilty plea stage and that the right may not be waived through a plea agreement, the Ninth Circuit has invalidated that standard plea practice. Review by this Court is warranted to decide whether the Constitution requires that dramatic change in the federal criminal justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50048

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANGELA RUIZ, DEFENDANT-APPELLANT

[Argued and Submitted: Oct. 12, 2000
Filed: March 5, 2001]

Before: BOOCHEVER, TASHIMA, and TALLMAN, Circuit Judges.

Opinion by Judge BOOCHEVER; Concurrence by Judge TASHIMA; Dissent by Judge TALLMAN

BOOCHEVER, Circuit Judge:

Angela Ruiz ("Ruiz") appeals from the sentence imposed by the district court after she pled guilty to charges of marijuana importation. Ruiz challenges the Government's refusal to recommend, and the district court's denial of, a downward departure from the applicable sentencing guideline range under the "fast track" program. We reverse and remand.

BACKGROUND

Ruiz was arrested for importing marijuana from Mexico into the United States. The Government offered

a plea bargain which, among other things, provided for a two-level downward departure from the otherwise applicable sentencing guideline range under the "fast track" program. The United States Attorney's Office for the Southern District of California adopted the "fast track" program to minimize the expenditure of government resources and expedite the processing of more routine cases. Plea bargains offered under this program require defendants to plead guilty, as well as waive their rights to an indictment, to an appeal, and to present motions. Defendants must also waive their rights to receive certain information pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). In exchange, the Government promises to recommend a two-level downward departure to the sentencing judge.[1]

According to Ruiz, she declined to accept the plea bargain because it contained an unconstitutional waiver of *Brady* rights. She subsequently pled guilty to the charges with no plea agreement. At the sentencing hearing, Ruiz requested several downward departures, including a two-level "fast track" departure. The Government opposed the request. Ruiz claimed that she nevertheless qualified for the departure because, aside from refusing to waive her *Brady* rights, she substantially complied with the requirements of the "fast track" program (*e.g.*, entering an early guilty plea and declining to file motions). Ruiz also argued that the Government opposed the "fast track" request only because she refused to enter into a plea agreement containing an unconstitutional waiver of her *Brady* rights.

[1] Elsewhere, we have more fully described the operation of and the policies behind the "fast track" program. *See United States v. Ramirez-Cortez*, 213 F.3d 1149 (9th Cir. 2000); *United States v. Estrada-Plata*, 57 F.3d 757 (9th Cir. 1995).

The district court denied the downward departure because the Government provided no "fast track" recommendation and no plea agreement required the Government to do otherwise. Ruiz's sentencing range was 18-24 months. Had Ruiz received the two-level "fast track" departure, the range would have been 12-18 months. The district court sentenced Ruiz to 18 months.

DISCUSSION

Ruiz argues that the Government's refusal to recommend a two-level "fast track" departure was unconstitutional. At the center of Ruiz's appeal is the contention that the right to receive undisclosed *Brady* evidence cannot be waived through plea agreements. Ruiz argues that, because *Brady* rights are not waivable, prosecutors cannot condition the benefits of a plea bargain (*e.g.*, a "fast track" recommendation) on the waiver of such rights; or, stated alternatively, prosecutors cannot withhold the benefits of a plea bargain simply because a defendant refuses to waive her unwaivable *Brady* rights. According to Ruiz, the Government withheld the "fast track" recommendation for this unconstitutional reason and, therefore, the district court had authority to provide a remedy (*e.g.*, grant the two-level "fast track" departure on its own).

Ruiz asks this court to vacate her sentence and remand the case so the district court may determine whether the Government acted with an unconstitutional motive and, if so, whether it should exercise its discretion to provide a remedy for the violation.

I. Appellate Jurisdiction

As an initial matter, the Government contends that we lack jurisdiction over Ruiz's appeal. The Government argues that its refusal to recommend a "fast track" departure and the district court's denial of Ruiz's request for the same are not reviewable. We disagree.

The statute governing a defendant's right to appeal a federal sentence, 18 U.S.C. § 3742(a), provides in relevant part:

> A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines[.]

As a general rule, under 18 U.S.C. § 3742, we cannot review a district court's discretionary denial of a defendant's request for a downward departure from the sentencing guidelines. *United States v. Morales*, 898 F.2d 99, 102 (9th Cir. 1990). This general rule of nonreviewability, however, does not insulate any and all decisions by district courts to reject downward departures. It only precludes appellate review of the court's exercise of discretion in such matters. *See id.* (decision to deny departure not reviewable because it "was an act of discretion"). Claims that the district court failed to exercise any discretion at all in rejecting a downward departure are reviewable. *United States v. Cervantes-Valenzuela*, 931 F.2d 27, 29 (9th Cir. 1991) (per curiam). Also, we have jurisdiction over claims that the district court rested its decision not to depart on an erroneous belief that it lacked authority to do so. *United States v. Eaton*, 31 F.3d 789, 793 (9th Cir. 1994).

Jurisdiction is also proper over constitutional challenges to the sentencing process, like the challenge Ruiz brings here. *See, e.g., United States v. Khoury*, 62 F.3d 1138, 1140-41 (9th Cir. 1995) (holding that appellate courts have jurisdiction over constitutional challenges to government's refusal to recommend and district court's denial of downward departure); *United States v. Arishi*, 54 F.3d 596, 597-98 (9th Cir. 1995) (same); *see also Wade v. United States*, 504 U.S. 181, 112 S. Ct. 1840, 118 L.Ed.2d 524 (1992) (exercising jurisdiction over similar claim); *United States v. Mikaelian*, 168 F.3d 380, 384 (9th Cir. 1999) (same); *United States v. Murphy*, 65 F.3d 758, 762-64 (9th Cir. 1995) (same); *United States v. Treleaven*, 35 F.3d 458, 460-61 (9th Cir. 1994) (same).

Although the above cases do not expressly state that constitutional challenges are reviewable under section 3742(a)(1) as claims that the sentence was "imposed in violation of law," other circuits have articulated this sensible rationale. *See, e.g., United States v. Senn*, 102 F.3d 327, 331 (7th Cir. 1996) (constitutional claim that prosecutor arbitrarily refused to recommend greater downward departure satisfies "violation of law" standard of section 3742(a)); *United States v. Graham*, 72 F.3d 352, 358 n. 8 (3rd Cir. 1995) (constitutional claim that prosecutor tainted sentencing hearing by introducing undisclosed allegations satisfies "violation of law" standard); *United States v. Holmes*, 60 F.3d 1134, 1137 (4th Cir. 1995) (constitutional claim that district court sentenced defendant at top of guideline range because victims were black was claim that sentence was "imposed in violation of law"); *see also United States v. Drown*, 942 F.2d 55 (1st Cir. 1991) ("When a defendant unsuccessfully challenges not the judge's exercise of

discretion but the constitutionality of the scheme under which he was sentenced, the court of appeals has appellate jurisdiction under 18 U.S.C. § 3742(a)(1).").

For the foregoing reasons, we conclude that a constitutional challenge to a prosecutor's refusal to recommend a downward departure, and a district court's refusal to grant such a departure, is appealable under 18 U.S.C. § 3742(a)(1) as a claim that the sentence was "imposed in violation of law." Therefore, we have jurisdiction over Ruiz's constitutional challenge to the Government's refusal to recommend a "fast track" departure and the district court's refusal to grant the same.[2]

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[2] The Government does not argue that we are divested of jurisdiction because the district court understood it could grant the "fast track" departure without a government recommendation. Nevertheless, the dissent would conclude jurisdiction is lacking on this basis. We decline to accept the dissent's reading of the record. At the sentencing hearing, the district court expressed its belief with sufficient clarity that, because Ruiz rejected the Government's plea agreement, it lacked the power to grant the "fast track" departure. It stated, "Counsel, isn't your plea bargain a matter of contract that's an offer and acceptance? . . . And if you don't accept it, that's a decision you have to make. And if you do, the Government is bound by it." In fact, the Government confirms in its opposition brief that "[t]he district court simply pointed out that the proposed plea agreement was a contract that Ruiz did not enter into, and therefore, the unaccepted benefits were not available." Moreover, even if the district court had understood that "the absence of [government] consent does not constitute an absolute and categorical bar to departure" under the "fast track" program, *see United States v. Rodriguez-Lopez*, 198 F.3d 773, 775-76 (9th Cir. 1999), we doubt such a general understanding would entitle the district court to ignore a defendant's specific constitutional challenge to the sentencing process and preclude appellate review of the same.

The Government argues in the alternative (and the dissent would agree) that, by pleading guilty, Ruiz forfeited her right to challenge the constitutionality of the *Brady* waiver contained in the plea bargain she rejected before entering her guilty plea. Generally, an unconditional guilty plea extinguishes the right to appeal all rulings and constitutional defects preceding the plea. *United States v. Broce*, 488 U.S. 563, 109 S. Ct. 757, 102 L.Ed.2d 927 (1989).

The Government mischaracterizes Ruiz's appeal. Ruiz claims that the Government violated her constitutional rights *after* she pled guilty. Specifically, she asserts that the Government unconstitutionally refused to recommend the "fast track" departure at the sentencing hearing. As the alleged constitutional violation from which Ruiz seeks relief did not occur until *after* the guilty plea, Ruiz is entitled to seek review. We recognize that, to prevail on her downward departure claim, Ruiz must show that the *Brady* waiver contained in the rejected plea agreement is unconstitutional. However, this showing is only relevant as evidence that the Government acted with an unconstitutional motive at the sentencing hearing.

The Government also suggests that Ruiz's appeal must fail because Ruiz is trying to enforce the terms of a plea bargain (*i.e.*, the two-level "fast track" departure) which she rejected. Again, the Government mischaracterizes Ruiz's appeal. Ruiz is not attempting to enforce the rejected plea agreement as a contract. As discussed above, she brings a constitutional challenge to the Government's refusal to recommend a downward departure from the sentencing guidelines. The rejected plea agreement, with the two-level "fast track" depar-

ture and the *Brady* waiver, is merely evidence of the Government's allegedly impermissible motive.

II. Constitutionality of the Government's Refusal to Recommend the "Fast Track" Departure

Ruiz argues that the Government unconstitutionally refused to recommend a "fast-track" departure. Specifically, Ruiz contends that: (1) the right to receive undisclosed *Brady* evidence is not subject to waiver through plea agreements, (2) prosecutors cannot withhold a "fast track" recommendation simply because a defendant declines to waive her *Brady* rights, and (3) the Government here withheld the "fast track" recommendation for this reason. We address each argument in turn.

A. Validity of *Brady* Waiver

The plea agreement offered by the Government contained a waiver of certain rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the Supreme Court held that the Due Process Clause requires prosecutors to disclose evidence that is material and favorable to the defendant. Ruiz argues that defendants cannot voluntarily and intelligently waive the constitutional right to receive undisclosed *Brady* evidence and, therefore, any such waiver is invalid. We review the validity of a waiver contained in a plea agreement de novo. *United States v. Martinez*, 143 F.3d 1266, 1270 (9th Cir. 1998).

1. Waiver of *Brady* Rights in General

Some constitutional rights are automatically waived by entering an unconditional guilty plea. Such rights include, among others, the right to a jury trial, the right to confront one's accusers, and the right to invoke the privilege against self-incrimination, *McCarthy v. United*

States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L.Ed.2d 418 (1969), as well as the right to challenge constitutional defects which occur before entry of the plea. *Broce*, 488 U.S. at 573-74, 109 S. Ct. 757.

Of the rights that survive entry of a guilty plea, some still may be expressly waived through plea agreements. For example, defendants generally may agree to waive the right to appeal the sentence, *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996), and the right to file a civil suit under 42 U.S.C. § 1983 seeking redress for government violations of constitutional rights. *Newton v. Rumery*, 480 U.S. 386, 397- 98, 107 S. Ct. 1187, 94 L.Ed.2d 405 (1987).

Some rights, however, can never be waived. For example, a plea agreement cannot bar defendants from asserting "claims involving a breach of the plea agreement, racial disparity in sentencing among codefendants or an illegal sentence imposed in excess of a maximum statutory penalty." *Baramdyka*, 95 F.3d at 843. Nor can defendants waive the right to a unanimous jury verdict, *United States v. Ullah*, 976 F.2d 509, 512 (9th Cir. 1992), or a speedy trial. *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997).

Ruiz argues that the due process right to receive undisclosed *Brady* information falls into the category of rights that can never be waived. Although no court has addressed whether *Brady* rights are waivable through plea agreements, we have determined that *Brady* rights are not automatically waived by entry of a guilty plea. In *Sanchez v. United States*, 50 F.3d 1448 (1995), we held that guilty pleas "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." *Id.* at 1453 (quotation marks omitted). We reasoned that "a defen-

dant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." *Id.* (quotation marks omitted). Also, we explained that "if a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." *Id.*

The rationale of *Sanchez* applies with equal force to plea agreements. Plea agreements, like guilty pleas, must be entered voluntarily and intelligently to satisfy due process requirements. *See Baramdyka*, 95 F.3d at 843; *United States v. Navarro-Botello*, 912 F.2d 318, 321-22 (9th Cir. 1990). The disclosure of *Brady* evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a guilty plea. In both situations, the defendant's decision "is often heavily influenced by his appraisal of the prosecution's case." *Sanchez*, 50 F.3d at 1453. Moreover, the same prosecutorial incentive to withhold *Brady* information that would arise if guilty pleas extinguished *Brady* rights, would arise if plea agreements could extinguish those rights. *See id.* Therefore, plea agreements, and any waiver of *Brady* rights contained therein, "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." *Id.* (quotation marks omitted).[3]

[3] Commentators analyzing this issue have followed the same logic and reached the same conclusion. *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2085 (2000) ("[B]ecause preplea disclosure [of *Brady* material] is required to ensure that a guilty plea comports with due process, then it cannot be waived without the plea itself being invalidated."); Erica G. Franklin, Comment, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 Stan. L. Rev. 567, 581 (1999) (waiver of *Brady* rights can never be intelligent and knowing because "the waiver, by definition, assures that the defendant can never know what he is waiving").

Other circuits have applied the same rationale to bar waivers of ineffective assistance of counsel claims associated with the negotiation of plea agreements. Claims of ineffective assistance of counsel, like claims based on the failure to disclose *Brady* evidence, challenge the voluntary and intelligent nature of the plea agreement. As the Eighth Circuit recently explained, a "decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside the range of competence[.]" *DeRoo v. United States*, 223 F.3d 919, 923-24 (8th Cir. 2000) (quotation marks omitted). Therefore, "'[j]ustice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of [an] agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness.'" *Id.* (quoting *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999)); *see also United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001) (waiver in plea agreement cannot bar ineffective assistance of counsel claims associated with negotiation of agreement); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995) (waiver of appeal does not bar "claim that the plea agreement generally, and the defendant's waiver of appeal specifically, were tainted by ineffective assis-

tance of counsel"); *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993) (same).[4]

For the same reason courts have concluded that the ineffective assistance of counsel during plea negotiations invalidates the plea agreement, we conclude that the failure to disclose *Brady* evidence also invalidates the plea agreement. In both cases, by definition, the defendant cannot accept the plea agreement intelligently and voluntarily as required by due process. Without an intelligent and voluntary acceptance, the plea agreement cannot be valid. If the plea agreement is invalid, all waivers contained in the plea agreement, including the waiver of the right to receive undisclosed *Brady* evidence, must also be invalid. The "waiver [can]not bar claims that relate to the validity of the waiver itself." *United States v. Racich*, 35 F. Supp. 2d 1206, 1210 (N.D. Cal. 1999), *aff'd*, 215 F.3d 1335 (9th Cir. 2000).[5]

The Government contends that a plea agreement's waiver of the right to receive undisclosed *Brady* evi-

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[4] We have expressed our approval of this conclusion in dicta. *See United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) ("We doubt that a plea agreement could waive a claim of ineffective assistance of counsel based on counsel's erroneously unprofessional inducement of the defendant to plead guilty or accept a particular plea bargain."); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1992) (stating that express waiver of appeal does not categorically foreclose claim based on ineffective assistance of counsel or involuntariness of waiver); *see also Baramdyka*, 95 F.3d at 844 (following *Pruitt*).

[5] The same principle apples to claims of incompetence. A defendant who is incompetent cannot "knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate v. Robinson*, 383 U.S. 375, 384, 86 S. Ct. 836, 15 L. Ed.2d 815 (1966).

dence satisfies the voluntary and intelligent requirement because, unlike the entry of a guilty plea, a plea agreement ensures that the defendant is aware of the rights being waived. In *Sanchez*, however, it was not the government's failure to disclose the right to *Brady* evidence that we found rendered guilty pleas involuntary and unintelligent; it was the failure to disclose the actual *Brady* evidence. *See Sanchez*, 50 F.3d at 1454. A defendant's abstract awareness of her rights under *Brady* is a pale substitute for the receipt of concrete *Brady* material which, for example, may include evidence that the arresting officer was twice convicted of perjury or that another suspect confessed to the crime. Without disclosure of the *Brady* evidence itself, the plea agreement and the *Brady* waiver contained therein cannot be intelligent and voluntary. Therefore, we conclude that a defendant's right to receive undisclosed *Brady* material cannot be waived through a plea agreement and that any such waiver is invalid.

2. Waiver of Impeachment Evidence

The Government argues that, even if a waiver of *all Brady* rights is invalid, the plea agreement at issue here is still valid because it only waives *some Brady* rights. In particular, the plea agreement's waiver only applies to impeachment evidence, *i.e.*, *Brady* information relating to the credibility of government witnesses. It does not apply to exculpatory evidence, *i.e.*, *Brady* information relating to the factual innocence of the defendant. The waiver provides:

WAIVER OF RIGHT TO BE PROVIDED WITH IMPEACHMENT AND AFFIRMATIVE DEFENSE INFORMATION

The Government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The Government understands it has continuing duty to provide such information establishing factual innocence of the defendant.

The defendant understands that if this case proceeded to trial, the Government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the Government would be required to provide information in its possession that supports such a defense. In return for the Government's promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information.

The *Brady* rule encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985). The Government contends that impeachment evidence is only relevant if there is going to be a trial. Therefore, according to the Government, it need not disclose such evidence at the pretrial, plea bargain stage. In *Bagley*, however, the Supreme Court declined to recognize any meaningful difference between these two types of *Brady* evidence. "This Court has rejected any such distinction between impeachment

evidence and exculpatory evidence. . . . When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*]." *Id.* at 676-677, 105 S. Ct. 3375 (quotation marks omitted).

Moreover, nothing in *Sanchez* suggests that only exculpatory evidence must be disclosed before the entry of a guilty plea. In *Sanchez*, we held that prosecutors must disclose *Brady* material before a defendant enters a guilty plea, without drawing a distinction between exculpatory and impeachment evidence. 50 F.3d at 1453. Nor would such a distinction make much sense. In the context of guilty pleas, the government is only required to disclose evidence favorable to the defendant if it is "material." *Id.* Evidence is "material" if "there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial." *Id.* at 1454. We see no reason why prosecutors should be permitted to withhold "material" impeachment evidence when disclosure of such evidence would create a reasonable probability the defendant would reject the plea agreement.

The principal case upon which the Government relies, *United States v. Gordon*, 844 F.2d 1397 (9th Cir. 1988), is consistent with this conclusion. In *Gordon*, we held that prosecutors must disclose *Brady* information "at a time when disclosure would be of value to the accused." *Id.* at 1403 (quotation marks omitted). Applying this principle in the context of a trial, we determined that the prosecution was required to disclose the impeachment evidence while the accused still had an opportunity to impeach the testifying witness. *Id.* This does not

mean, as the Government contends, that impeachment evidence is only valuable if there is going to be a trial. It simply means that, if there is going to be a trial, impeachment evidence, like exculpatory evidence, must be disclosed while it still is valuable.

When there is *not* going to be a trial, however, as in the context of plea bargaining, *Brady* evidence is only valuable to the accused if it is disclosed before acceptance of the plea agreement. *See Sanchez*, 50 F.3d at 1454 ("the decision whether or not to plead guilty is often heavily influenced by [the defendant's] appraisal of the prosecution's case"). Accordingly, we reject the Government's argument that it need only disclose impeachment evidence if there is going to be a trial, and we conclude that the limited *Brady* waiver contained in the Government's plea agreement is invalid.

This conclusion, however, does not by itself entitle Ruiz to relief. She must also demonstrate that, as a legal matter, it is unconstitutional or arbitrary for prosecutors to oppose a downward departure based on a defendant's refusal to waive *Brady* rights. Finally, Ruiz must show that, as a factual matter, the Government opposed the downward departure for this reason.

B. Constitutionality of Opposing Downward Departure Based on Defendant's Refusal to Waive *Brady* Rights

Prosecutors cannot withhold a recommendation for a downward departure on the basis of an unconstitutional motive (*e.g.*, racial or religious discrimination) or arbitrarily (*i.e.*, for reasons not rationally related to any legitimate governmental interest). *Wade v. United States*, 504 U.S. 181, 185-86, 112 S. Ct. 1840, 118 L.Ed.2d 524 (1992); *see also United States v. Treleaven*, 35 F.3d 458, 461 (9th Cir. 1994) (relief appropriate if "the government's refusal to move for a downward departure was based on impermissible motives, constituted a breach of a plea agreement, or was not rationally related to any legitimate government purpose").[6]

Ruiz contends that the Government acted with an unconstitutional motive in refusing to recommend a "fast track" departure at her sentencing hearing. Ruiz argues that, because *Brady* rights are not waivable, the Government cannot legitimately withhold the benefits of a departure recommendation based on Ruiz's refusal to waive these rights. The Government suggests that conditioning a plea agreement on the waiver of *Brady* rights is nevertheless proper because Ruiz was always free to reject the agreement.

It is true that "incentives for plea bargaining are not unconstitutional merely because they are intended to encourage a defendant to forego constitutionally protected conduct." *United States v. Villasenor-Cesar*, 114 F.3d 970, 975 (9th Cir. 1997) (internal alterations, quotation marks omitted). This general rule, however,

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[6] The Government, as well as the dissent, suggest that this rule only applies to downward departure recommendations based on a defendant's "substantial assistance" to the government and does not apply to recommendations under the "fast track" program. Although the facts in *Wade* involved a "substantial assistance" recommendation, the Supreme Court reaffirmed that prosecutorial decisions in general are subject to constitutional limitations. In concluding that prosecutors cannot withhold "substantial assistance" recommendations for unconstitutional or arbitrary reasons, the Court explained, "[W]e see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions." *Wade*, 504 U.S. at 185, 112 S. Ct. 1840. Likewise, we see no reason why courts should treat a prosecutor's refusal to file a "fast track" motion differently from a prosecutor's other decisions.

does not mean prosecutors may, for any reason, withhold discretionary benefits offered in a rejected plea bargain. *See, e.g., Khoury*, 62 F.3d at 1141-43 (government cannot vindictively withhold departure recommendation simply because defendant rejected plea bargain and exercised right to trial).

More importantly, the general rule that prosecutors may encourage the waiver of constitutional rights is premised on the assumption that the targeted rights may be validly waived. *See, e.g., United States v. Murphy*, 65 F.3d 758 (9th Cir. 1995) (involving incentives to forgo waivable right to trial). Here, in contrast, the due process right to receive undisclosed *Brady* material cannot be waived without offending another due process requirement, namely, that plea agreements be entered voluntarily and intelligently. Because *Brady* waivers are themselves unconstitutional, we conclude it is unconstitutional for prosecutors to withhold a departure recommendation based on a defendant's refusal to accept such a waiver.

C. Evidence of Improper Motive

Ruiz must also make a "substantial threshold showing" by producing evidence that the Government, in fact, acted with an unconstitutional motive in refusing to move for a downward departure. *See Wade*, 504 U.S. at 186, 112 S. Ct. 1840. If Ruiz succeeds in making this showing, she would be entitled to an evidentiary hearing on remand regarding the Government's motives. *Id.* If the district court on remand determines that the Government acted with an unconstitutional motive, then it may, in its discretion, provide a remedy for the violation (*e.g.*, grant Ruiz's request for the "fast track" departure). *See id.* at 185-86, 112 S. Ct. 1840.

As discussed above, Ruiz argues that the Government opposed the "fast track" departure because she refused to waive her *Brady* rights. To show the Government was motivated by this impermissible consideration, Ruiz's counsel represented in the sentencing memorandum, at the sentencing hearing, and in the briefs on appeal, that Ruiz rejected the plea bargain only because it contained the *Brady* waiver. The Government argues that no admissible evidence supports Ruiz's claim that she rejected the plea bargain for this reason. The district court did not make any factual findings regarding the motives of Ruiz or the Government.

It is undisputed, however, that the plea bargain offered by the Government contained a waiver of certain *Brady* rights, that Ruiz rejected that plea bargain, and that the Government opposed the "fast track" departure because no plea bargain obligated it to do otherwise. The district court denied Ruiz's request for a "fast track" departure due to the absence of any plea agreement providing that benefit. We find that this showing, combined with defense counsel's consistent representations to the sentencing judge that Ruiz declined the plea bargain only because it contained a *Brady* waiver, is sufficient to warrant an evidentiary hearing to determine whether the Government declined to recommend a "fast track" departure because Ruiz refused to waive her *Brady* rights.[7]

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[7] The dissent would hold that Ruiz failed to make a "substantial threshold showing" because "there were other highly plausible, and more likely reasons why the prosecutor refused to move for the departure." Dissent at 2767, 2768. Nevertheless, based on the evidence presented, it is also plausible that the Government declined to make the "fast track" recommendation because Ruiz

The Government also argues that even if it opposed the departure because Ruiz refused to waive her *Brady* rights, the district court rejected her request for an altogether different reason. Specifically, the Government contends that the district court denied Ruiz's request for the "fast track" departure because it believed that, without a plea agreement, Ruiz did not qualify for the departure. A district court's denial of a downward departure on this basis, however, does not insulate a prosecutor's underlying improper motive for failing to recommend a departure. *See Wade*, 504 U.S. at 185-86, 112 S. Ct. 1840 (district court precluded from denying downward departure based on government's refusal to recommend it if government did so for unconstitutional reasons).

We find that Ruiz has made a substantial threshold showing that the Government acted with an unconsti-

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refused to waive her right to undisclosed *Brady* material. Ruiz need not demonstrate anything more to make a "substantial threshold showing" and secure the right to an evidentiary hearing on remand regarding this matter. *See Wade*, 504 U.S. at 186, 112 S. Ct. 1840.

The dissent also would hold that the constitutionality of the Government's *Brady* waiver "is wholly irrelevant to whether the prosecutor acted with an unconstitutional motive at sentencing." Dissent at 2769. However, if the *Brady* waiver were constitutional, Ruiz would have no basis for arguing that the Government withheld the "fast track" recommendation for an unconstitutional reason. *See Murphy*, 65 F.3d at 763 (finding no unconstitutional motive when prosecutor conditioned recommendation on waiver of waivable right to jury trial because no additional showing of prosecutorial vindictiveness). Therefore, the question of whether the *Brady* waiver is constitutional is not only relevant, it is integral to the determination of whether Ruiz has presented a "substantial threshold showing" that the Government acted with an impermissible motive.

tutional motive in refusing to recommend the "fast track" departure. Accordingly, Ruiz is entitled to an evidentiary hearing on remand concerning her constitutional claim.

CONCLUSION

We vacate Ruiz's sentence and remand the case for resentencing. On remand, the district court shall conduct an evidentiary hearing to determine whether the Government withheld the "fast track" recommendation because Ruiz refused to waive her *Brady* rights. If the district court finds that the Government acted, at least in part, for this reason, it must then determine in its discretion whether to provide a remedy for the violation.

REVERSED AND REMANDED.

TASHIMA, Circuit Judge, concurring:

I concur fully in Judge Boochever's majority opinion. I write separately only to respond to two points made by the dissent.

In making its argument that we lack appellate jurisdiction in this case, the dissent criticizes the majority for relying "primarily on cases dealing with substantial assistance departures. . . ." The dissent mistakenly asserts that these cases are not relevant to our jurisdiction to hear this appeal. "Section 5K1.1 is different from other departures because a court generally may not order a downward departure under § 5K1.1 unless the prosecutor first moves for it. Most other downward departures, *including the fast track depar-*

ture at issue here, may be granted on motion of the defense and at the district court's discretion, regardless of the prosecutor's position." Dissent at 2765 (citing U.S.S.G. § 5K2.0) (emphasis added).

While it is true that there is no statutory requirement that "the prosecutor first move[ ] for it," it does not follow that a fast track departure may be granted at the district court's discretion, "regardless of the prosecutor's position." The reason that the prosecutor's position cannot, as a practical matter, be disregarded is because the fast track departure itself is extra-statutory, *i.e.*, it likely is not authorized by § 5K2.0, or any other provision of the Guidelines. Thus, if such a departure were granted in a case in which the prosecution was opposed to it, the prosecution could conceivably appeal the departure,[1] and would have strong ground to argue for a reversal.

The fast track "policy" of the United States Attorney for the Southern District of California provides for a two-level downward departure from the offense level otherwise calculated in accordance with the Sentencing Guidelines, if the defendant agrees to certain conditions, *i.e.*, waiver of indictment, plea of guilty, waiver of pre-trial motions, and waiver of right to appeal.[2] It is highly doubtful, to say the least, that such a departure

[1] Granted, it would take real "chutzpah" for it to do so, but such chutzpah has been demonstrated before. *See United States v. Ramirez-Cortez*, 213 F.3d 1149, 1159 (9th Cir. 2000) (Silverman, J., dissenting).

[2] It is important to note that this departure "policy" is a policy of the United States Attorney; it is not the policy of the United States Sentencing Commission or even of the district court.

is authorized by the Guidelines.[3] A fast track departure is nowhere specifically authorized by the Guidelines.[4] It is also doubtful that the fast track departure can be justified under § 5K2.0, which authorizes only case-by-case departures in unusual cases, not wholesale departures on the basis of a district-wide "policy" of the prosecutor. *See* U.S.S.G. § 5K2.0 (Policy Statement) ("The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis."). Further, to justify a departure under § 5K2.0, "certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline." *Id. (Commentary)* (quoting *Koon v. United States*, 518 U.S. 81, 98, 116 S. Ct. 2035, 135 L.Ed.2d 392 (1996)). *Cf. United States v. Banuelos-Rodriguez*, 215 F.3d 969, 972-75 (9th Cir. 2000) (en banc) (discussing why existence of a fast track departure policy in another district was not a proper ground for departure in the sentencing district which had no such policy). Yet, there is no requirement in the fast

[3] The legality of the fast track departure is not at issue in this case and I do not directly address that issue. My only purpose in pointing out the doubtful legality of the fast track departure is to demonstrate why it is more appropriate to analogize to our substantial assistance cases, rather than to our § 5K2.0 departure cases, in terms of appellate jurisdiction and review.

[4] U.S.S.G. § 3E1.1, which provides for a two or three-level downward adjustment of the offense level for early acceptance of responsibility, duplicates many of the factors on which the fast track departure is based. The extra-point decrease is given for "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." *Id.* § 3E1.1(b)(2). In the Southern District of California, the two-level, fast track departure is given *in addition to* the § 3E1.1 adjustment.

track departure policy of a finding that the case falls outside of the heartland of illegal reentry cases; indeed, the policy seems to target precisely the run-of-the-mill, heartland case.

For these reasons, as a practical matter, fast track departure cases are more like substantial assistance cases than other types of departures in that it would be highly unlikely that a court would feel free to exercise its doubtful discretion to grant such a departure in the absence of the government's agreement to do so. On the other hand, they are routinely granted when recommended by the government.[5] Thus, I submit that the dissent is mistaken in its assumption that "the district court in departure cases relevant to the instant case can be presumed to know that it has discretion to depart because a motion by the prosecutor is not statutorily required." Dissent at 2766. While the dissent's presumption is rightly applied in cases clearly falling within § 5K2.0, it has no application with respect to the extra-statutory, fast track departure. I thus conclude that reviewability of the district court's failure or refusal to grant a fast track departure should be judged by the standards which we employ to determine whether a court's failure or refusal to grant a substantial assistance departure is reviewable. Under those cases, as the majority opinion correctly concludes, we have jurisdiction to review the district court's de-

[5] The fast track policy can remain workable only so long as the parties can depend on the court to carry through with the government's bargain in the fast track plea agreement that, in return for reducing the government's prosecutorial burden, the defendant will receive the benefit of an extra two-level downward departure outside the parameters of the Guidelines.

cision not to depart under the fast track policy in this case.

Finally, we are no less mindful of the extremely heavy workload in the Southern District of California than is the dissent. We disagree, however, with its alarmist prediction that this decision "jeopardizes the fast track program." Dissent at 2773. As the dissent itself points out, this is a "simple case," as are most § 1326 cases. *Id.* In such cases, there will usually be no more than one or two government witnesses and, in all likelihood, no impeachment material in the prosecution's possession. Thus, in most cases, compliance with the government's *Brady* obligation respecting impeachment material in its possession should not be onerous.

Increased prosecutorial efficiency is a commendable goal, but it surely should not be advanced at the cost of requiring the accused to give up an unwaivable constitutional right. The appropriate solution to the Southern District of California's caseload crisis[6] is for Congress to authorize more judgeships, not to shortcut the Constitution.

TALLMAN, Circuit Judge, dissenting:

The Court today crafts a rule that is both unnecessary to the disposition of this case and detrimental to the ability of an overburdened and understaffed district to dispose fairly and expeditiously of criminal cases under the "fast track" program. I respectfully dissent.

[6] As the dissent points out, the weighted caseload per active judgeship in the Southern District of California was more than twice the median caseload of all districts in the Ninth Circuit. *See* dissent at 2773 n. 4.

I. BACKGROUND.

Shortly after her arrest and initial appearance, the government offered Angela Ruiz, a "mule" caught red-handed carrying drugs across the border, a plea bargain. The agreement, if accepted, would have required her to file no motions other than certain sentencing memoranda, to plead guilty within 30 days of her initial appearance, and to waive her rights to an indictment and to non-exculpatory impeachment material.[1] In exchange, the government would argue at her sentencing hearing for a two-level fast track downward departure, which the sentencing court would have plenary discretion to grant or deny. Had she taken it, the district court would have achieved a quick disposition in a simple case. The parties would have been spared the time and expense of pre-trial proceedings and trial preparation. And the defendant would have received the benefit of a reduced sentence. But Ruiz chose to decline the government's offer to participate in the fast track program.

The prosecutor was forced to continue with the costly, time-consuming process of prosecuting her case. The grand jury proceeded to indict her. She was arraigned and a date for the motions hearing was set. Prior to the motions hearing, Ruiz's appearance bond

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[1] Contrary to the majority's characterization, the government was not asking Ruiz to waive her rights to *Brady* information. In the standard plea agreement offered to Ruiz, the government acknowledges its ongoing obligation to give the defendant all information relating to factual innocence, and only requires the defendant to waive her rights to information that goes to impeachment of government witnesses. The government remains obligated to turn over all *Brady* material, including impeachment information that clearly falls under the *Brady* rule.

was revoked and she was remanded to custody because she had tested positive for use of cocaine and PCP. Two months after her initial appearance, without reference to the fast track agreement previously offered by the government, Ruiz entered an unconditional plea of guilty.

Despite Ruiz's rejection of the fast track plea offer, at the sentencing hearing her counsel argued that she was entitled to a two-level fast track downward departure. The government opposed the motion. The trial court considered her argument and rejected it. She was sentenced within the guidelines range for the crime to which she had unconditionally pled guilty.

Ruiz now asks us to reverse the district court and to give her the benefit of the fast track agreement that she rejected despite the fact that she deprived the government of its benefit by forcing it to indict her and continue prosecuting her. She asserts that she is entitled to this benefit because requiring her to waive her right to impeachment information places an unconstitutional condition on her acceptance of the agreement.

Ruiz's counsel concocted this argument *post hoc* in an attempt to obtain for his client a second bite at the sentencing apple. Prior to sentencing, Ruiz did not object to the plea offer's requirement that she waive her right to impeachment material. The record is devoid of any evidence that she requested from the government an agreement that did not contain such a waiver.

The majority, announcing today for the first time that the right to impeachment information is one of those rare constitutional rights that cannot be waived,

has regrettably decided to give Ruiz another bite. I cannot join in this unprecedented decision.

II. JURISDICTION.

We lack subject-matter jurisdiction to hear this case for two reasons. First, we do not have jurisdiction to review a district court's decision to deny a request for a downward departure. Second, Ruiz unconditionally pled guilty to the charge of marijuana importation. We have no jurisdiction to review a defendant's claim that her constitutional rights were violated if the alleged violation occurred prior to the entry of an unconditional guilty plea. We therefore cannot decide whether Ruiz can waive her rights to impeachment information.

A. Jurisdiction to Review Ruiz's Sentence.

The majority characterizes Ruiz's claim as a challenge to the sentence based on the prosecutor's alleged unconstitutional motive in refusing to recommend the downward departure. With few exceptions, we lack jurisdiction to review a district court's decision not to depart. *See United States v. Morales*, 898 F.2d 99, 102 (9th Cir. 1990).

1. The District Court's Discretion to Depart.

The majority relies primarily on cases dealing with substantial assistance departures in deciding that this case falls within an exception to the jurisdictional bar.[2] *See* Op. at 2774. *See also* U.S.S.G. § 5K1.1. These cases

[2] A U.S.S.G. § 5K1.1 "substantial assistance" departure rewards a defendant for providing the prosecutor with material assistance in prosecuting the case against co-defendants or investigating other related cases. Unlike a fast track downward departure, a substantial assistance departure does not reward a defendant for expediting resolution of her case.

are not relevant to the type of departure requested by Ruiz. Section 5K1.1 is different from other departures because a court generally may not order a downward departure under § 5K1.1 unless the prosecutor first moves for it. Most other downward departures, including the fast track departure at issue here, may be granted on motion of the defense and at the district court's discretion, regardless of the prosecutor's position. *See* U.S.S.G. § 5K2.0.

The requirement under § 5K1.1 that the prosecutor move prior to the district court having *authority* to depart is the underlying basis for the litigation that gives rise to the cases cited by the majority. Those cases deal with whether, if the prosecutor refuses for some reason to move for the departure, the district court has the authority to grant the departure notwithstanding the lack of a motion, as is required. *See, e.g., United States v. Khoury*, 62 F.3d 1138 (9th Cir. 1995). In *Khoury* we held that if the defendant makes a "substantial threshold showing" that the prosecutor acted with an unconstitutional motive in refusing to move for a § 5K1.1 departure, the district court must conduct a hearing to determine whether such a motive existed and whether the departure should be granted despite the lack of a motion by the prosecutor. *Id.* at 1141. If the district court, without conducting a "substantial threshold showing" inquiry, concludes that it does not have discretion to depart, its decision is reviewable on appeal. *Id.*

If, however, the district court concludes that the defendant did not make a substantial threshold showing of unconstitutional motive, then the district court has no discretion to depart. *See United States v. Murphy*, 65 F.3d 758, 762 (9th Cir. 1995). In such a situation, the

only determination that is reviewable on appeal is whether the defendant made a substantial threshold showing of unconstitutional motive. *Id.* Finally, if the district court decides that it has discretion to depart, and exercises that discretion by denying the departure, its decision is *not* reviewable on appeal. *See id.*

The presumption in § 5K1.1 cases is that the district court did not know that it had discretion to depart unless it clearly indicated that it did know. In contrast, the district court in departure cases relevant to the instant case can be presumed to know that it has discretion to depart because a motion by the prosecutor is not statutorily required. Although in cases not involving § 5K1.1 a district court may consider a prosecutor's arguments in favor of or against the departure when a prosecutor makes such an argument, the court has the discretion to depart and can do so *sua sponte*. We recently acknowledged: "To hold that government consent [to a departure] is a mandatory condition in cases other than those in which government consent is explicitly required by the Guidelines (as it is, for example, *in departures for substantial assistance*), . . . runs afoul . . . of the Guidelines themselves, by impermissibly shifting the locus of discretionary decision-making from the district judge to the prosecution." *United States v. Rodriguez-Lopez*, 198 F.3d 773, 778 (9th Cir. 1999) (emphasis added).

Because other sentencing departures do not require the prosecutor to move, it makes sense to treat the district court's decision differently in cases that do not involve departures under § 5K1.1. We may presume in these cases, including in the instant case, that the district court knows what the law is and applies the law correctly even if it does not explicitly acknowledge that

it has discretion and is exercising that discretion. *See United States v. Eaton*, 31 F.3d 789, 793 (9th Cir. 1994) ("We have held that a court's failure to depart without any comment on its authority to do so does not automatically convert a discretionary departure into a sentence imposed in violation of law."); *United States v. Garcia-Garcia*, 927 F.2d 489, 491 (9th Cir. 1991) (holding that a sentence imposed was not in violation of the law under § 3742(a) when the district court said nothing about its discretion to depart and simply imposed the sentence without comment). *Cf. United States v. Cervantes-Valenzuela*, 931 F.2d 27, 29 (9th Cir. 1991) ("We assume that the district court knows and applies the law correctly. . . ."). Thus, we only have jurisdiction to review decisions not to depart in § 5K2.0 departure cases if the district court explicitly states or clearly indicates that it believes it does not have discretion to depart.

In this case, a fair reading of the transcript does not indicate in any way that the district court believed that it was not authorized to make a departure in the absence of a government motion. Although the district court did question Ruiz about her rejection of the plea agreement, it never stated nor even implied that it could not depart on its own. It recognized its discretion not to depart even if the prosecutor had moved for the departure. It concluded:

> The Court has read and considered the presentence report, the sentencing documents filed on behalf of the Defendant, and the Court finds that the base level of the offense is 18. . . . [T]he Court feels that this is not a proper case for any departures except for provided for by the regular sentencing procedures.

This statement is sufficient to establish that the district court exercised discretion in refusing to grant Ruiz the downward departure she sought.

2. The "Substantial Threshold Showing" Requirement.

Even following the majority's new rule that the § 5K1.1 standard applies to fast track downward departures, Ruiz failed to make a "substantial threshold showing" that the prosecutor acted with an unconstitutional motive. To make a substantial threshold showing of unconstitutional motive, a defendant must show that the prosecutor was vindictively punishing her for exercising a constitutional right by refusing to move for the departure.

In *Khoury*, for example, the prosecutor initially moved for a substantial assistance departure at sentencing, but after the defendant withdrew his guilty plea, went to trial, and was found guilty, the prosecutor refused to make a new motion for substantial assistance. *Khoury*, 62 F.3d at 1139- 40. We held that this constituted a substantial threshold showing of unconstitutional motive because nothing had changed between the first sentencing hearing and the second, other than the trial, that would reasonably lead the prosecutor to no longer believe that the defendant had offered substantial assistance. *Id.* at 1142. From this, the district court in *Khoury* could infer that the prosecutor was punishing the defendant for exercising his right to trial, thus justifying a hearing to make a determination as to whether the prosecutor acted improperly. *Compare id. with Murphy*, 65 F.3d at 763 (holding that the defendant did not meet the substantial threshold showing merely by offering evidence that the prosecutor threatened to withhold a § 5K1.1 motion if the defendant went to trial, and then carrying out that threat).

Unlike *Khoury*, where the only reasonable inference was that the prosecutor was punishing the defendant for exercising his right to trial, here there were other highly plausible, and more likely reasons why the prosecutor refused to move for the departure. Ruiz did not plead within thirty days from the initial appearance and she did not waive her right to an indictment. The government invested more time and work in preparing Ruiz's case than would have been required if Ruiz had accepted the plea agreement and pled within the time constraints, even without the impeachment waiver.

The very purpose of the fast track downward departure is to expedite the plea process and dramatically reduce the workload of the federal prosecutors, public defenders, and the district court. In exchange for expediting the resolution of the District's pending cases, the defendant receives a two-level downward departure at sentencing. Once everyone is required to put more time and effort into the case, as was necessary here, the reason for offering the departure is thwarted. The record supports the conclusion that this is the legitimate reason for the prosecutor's opposition to the downward departure in Ruiz's case ("[W]e [the government] are giving up all the benefits that would normally come with the fast track departure.").

Moreover, the record is devoid of any evidence that Ruiz told the prosecutor at the time of the offer that she was rejecting it because of the impeachment waiver. Nor does the record show that she attempted to negotiate away the waiver but was rebuffed. Such evidence, along with the prosecutor's refusal to move, may have been sufficient to satisfy the "substantial threshold showing" standard, but none was offered. The only evidence in her favor before us is that she was

offered the departure and refused it, later pled guilty, and then the prosecutor opposed her motion for the fast track downward departure. That evidence is insufficient to entitle her to a hearing under *Khoury*.

3. The Distinction Between Unconstitutional Motive and Unconstitutional Waiver.

The majority further complicates matters by mistakenly conflating two distinct constitutional challenges present in this case. It is asserted that, in order to make her claim for unconstitutional motive, Ruiz must show that the impeachment waiver was unconstitutional. But whether Ruiz could or could not waive her rights to the impeachment information is wholly irrelevant to whether the prosecutor acted with an unconstitutional motive at sentencing.

To illustrate this principle, one need only look at the facts in *Khoury*. 62 F.3d at 1138. The issue there was not whether Khoury could waive his right to trial. He undoubtedly could. Rather the issue was whether the prosecutor acted unconstitutionally by opposing a motion for a downward departure at sentencing solely because Khoury opted to exercise his right to a trial. *Id.* at 1142. We concluded that a prosecutor cannot act vindictively in refusing to move for a downward departure because a defendant wishes to exercise her constitutional rights. *Id.*[3]

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[3] The majority argues that "if the *Brady* waiver were constitutional, Ruiz would have no basis for arguing that the government withheld the 'fast track' recommendation for an unconstitutional reason." Op. at 2757 n. 7. Ruiz's basis for arguing that the government acted unconstitutionally in refusing to recommend the fast track departure would be that the prosecutor was punishing Ruiz for exercising her constitutional right to receive impeachment information, *whether or not that right is waivable*. *See Murphy*, 65 F.3d at 763 (holding that the defendant was required to present objective evidence that the prosecutor's decision to refuse a § 5K1.1 recommendation was "motivated by a desire to punish him for exercising his [waivable] right to trial"); *Khoury*, 62 F.3d at 1138 (holding that a prosecutor acts with an unconstitutional motive by refusing to recommend a downward departure in order to punish a defendant for exercising his *waivable* right to a jury trial).

I do not believe that Ruiz has made a substantial threshold showing that the prosecutor acted with a motive to punish her for exercising her right to receive the undisclosed material, whether or not that right is waivable. The majority disagrees. But the majority, by further holding that Ruiz *cannot* waive her right to receive what it mistakenly characterizes as *Brady* information, transforms this case from a minor dispute about the application of firmly established law to a distinct set of facts, to a new constitutional rule that once presumably waivable rights are now unwaivable. This transformation is wholly unnecessary to the resolution of the case and sets a dangerous precedent.

Likewise in this case, if the problem was really with the prosecutor's actions at the sentencing hearing, then whether Ruiz could or could not waive her right to impeachment information is irrelevant to whether the prosecutor acted with an unconstitutional motive at sentencing. In other words, even if Ruiz could waive her impeachment rights (as Khoury could waive his right to trial), Ruiz might still have a claim for unconstitutional motive against the prosecutor, following the majority's new rule that the "substantial threshold showing" standard applies in fast track departure cases.

The only way to reach the issue of whether impeachment rights are waivable is through a direct challenge to the plea offer, not by challenging the sentence. We do not have jurisdiction on this record to entertain a direct challenge to the waiver.

B. Jurisdiction to Review the Impeachment Waiver.

"An *unconditional* guilty plea constitutes a waiver of the right to appeal all non-jurisdictional antecedent rulings and cures all antecedent constitutional defects." *United States v. Floyd*, 108 F.3d 202, 204 (9th Cir. 1997) (emphasis in original). The Supreme Court has made it clear that a defendant, after admitting in open court that she is guilty, may not raise a claim that her constitutional rights were violated before she entered the plea. *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L.Ed.2d 235 (1973). She may challenge her plea only by demonstrating that it was not made voluntarily and intelligently. *Id.* She may do this by showing that her counsel was ineffective in giving her advice regarding the guilty plea, *id.*, or by demonstrating that her plea was made without the benefit of *Brady* material that the prosecution deliberately withheld without her knowledge. *See Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995).

The Court in *Tollett* made it clear that the primary inquiry is whether the plea was entered into voluntarily and intelligently. *Tollett*, 411 U.S. at 266, 93 S. Ct. 1602. Even if the alleged unconstitutionality was *unknown* to the defendant at the time she entered the unconditional plea, she is not entitled to appellate review unless she can make a showing that the plea was not made voluntarily or intelligently. *Id.*

The only way for Ruiz to challenge the impeachment waiver is by challenging her plea. And she can only challenge her plea by demonstrating that it was not made voluntarily or intelligently-that is, by demonstrating (1) that she made the plea without the benefit of the impeachment material and (2) that the impeachment material would have affected her decision to plead

guilty. *See Sanchez*, 50 F.3d at 1453-54. But she did not accept the government's plea offer. She has never alleged that she did not receive the impeachment material and we may presume in the absence of such an allegation that this information (if it even existed) was not kept from her.

The majority attempts to evade the *Tollett* rule by characterizing the unconstitutional act as the prosecutor's refusal to move for the downward departure at sentencing. Because the refusal occurred after the plea was entered, the majority argues, the *Tollett* rule precluding appellate review of antecedent constitutional defects is inapplicable.

As demonstrated in *Khoury*, however, Ruiz's complaint about the sentence imposed does not depend upon the waivability of her rights to impeachment information. The alleged unconstitutionality of the prosecutor's actions at sentencing are entirely distinct from the alleged unconstitutionality of the impeachment waiver that she never complained of before unconditionally pleading guilty.

Her complaint with regard to the waiver can only be that the prosecutor unconstitutionally conditioned the two-level downward departure on her waiving her unwaivable right to impeachment material. But the prosecutor requested this condition at the time of the plea offer, not at the time of sentencing. The constitutional defect, if any, occurred prior to the entry of the unconditional guilty plea. Thus, the *Tollett* rule applies, and Ruiz waived any challenge she may have had to the alleged unconstitutional conditioning of the downward departure on the impeachment waiver. Accordingly, we lack jurisdiction to review both Ruiz's sentence and the constitutionality of the impeachment waiver.

III. THE POLICY IMPLICATIONS OF THE NEW RULE.

In addition to the jurisdictional bar to our review, the Court's decision makes little sense from a policy standpoint. The government has an interest in maintaining the confidentiality of government witnesses and protecting ongoing investigations into other drug courier cases. We should not unnecessarily create a new rule that forces the government to turn over information to a defendant immediately upon beginning plea bargain negotiations, when that information will generally be of little use to the defendant unless she goes to trial. This disclosure is especially problematic when the release of the information could have detrimental consequences in future criminal proceedings, as it would, for example, if the government were required to publicly release information on the identity of an informant that it would like to keep confidential for as long as possible.

Perhaps most importantly, the majority's decision jeopardizes the fast track program, which, to this point, has been a highly successful way of resolving, prior to indictment, these types of cases in the Southern District of California. Through the fast track program the District has been able to dramatically expedite the processing of its heavy workload[4] by encouraging de-

[4] According to the 1999 Annual Report for the Ninth Circuit, the weighted total of filings per judgeship in 1998 was 1,030. *See* 1999 Annual Report for the Ninth Circuit at 52. The mean total for all district judges in the Ninth Circuit was almost half that of the Southern District of California, at 530 filings per judgeship, and the median was less than half, at 481 filings per judgeship. *Id.* The next busiest district, the District of Arizona, had total filings per judgeship of 814, over 200 filings per judgeship less than the Southern District of California. *Id.*

fendants in simple cases like this to plead very early in the process, waive indictment, and promise not to file any motions other than sentencing memoranda.

By also asking a defendant to waive her right to impeachment information, the prosecution can save itself from the often time-consuming process of determining which witnesses it may call at trial, what potential impeachment information on each witness is in its possession, and whether it must disclose that information to the defendant. This time-saving aspect is one of the reasons underlying the Jencks Act. 18 U.S.C. § 3500.

Because the majority holds the impeachment waiver unconstitutional, despite the fact that it lacks jurisdiction to do so, it dramatically reduces the efficacy of the fast track program. The government no longer has an incentive to offer the departure if the plea agreement does not significantly reduce the District's workload. Thus, the majority's new rule delays the efficient handling of cases that should be disposed of promptly to the benefit of everyone.

IV. CONCLUSION.

We lack jurisdiction to review Ruiz's sentence. More importantly, we lack jurisdiction to issue an unprecedented rule that defendants may not waive their rights to impeachment material. This brand new rule harms the administration of justice. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50048
D.C. No. 99CR2604-T

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANGELA RUIZ, DEFENDANT-APPELLANT

[Filed: June 11, 2001]

ORDER

Before: BOOCHEVER, TASHIMA, and TALLMAN, Circuit Judges.

Judges Boochever and Tashima have voted to deny the petition for rehearing. Judge Tashima has voted to deny the petition for rehearing en banc and Judge Boochever so recommends. Judge Tallman has voted to grant the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO

Case No. 99CR2604-T

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANGELA RUIZ, DEFENDANT

[Monday, Jan. 10, 2000, 9:00 a.m.]

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE HOWARD B. TURRENTINE UNITED STATES DISTRICT JUDGE

* * * * *

MR. BRITT: * * * * *

I filed two departures. One is the fast track departure. Ms. Ruiz did not file any motion She did everything that someone in her position would normally do but for the disagreement over the language in the standard plea agreement.

* * * * *

MR. MILLER: * * * * *

The Government opposes any further departure. Fast track is an exchange for some benefits to the Government because they may have some idea that something is unconstitutional in our plea agreement. We disagree with that greatly, and we are giving up all the benefits that would normally come with the fast track departure.

Furthermore, it seems that she only pled guilty after she was docketed on her OSC for her dirty test. She did this out of financial consideration, for financial consideration to buy drugs. And her positive test for cocaine and PCP should be an aggravated factor that should justify no departure.

* * * * *

MR. BRITT: Your Honor, with regard to the fast track, just briefly. Ms. Ruiz is in a position where she'd be willing to waive her appellate rights. As was mentioned in the sentencing memo, the real issue is with regard to the constitutionality of waiving *Brady* and *Giglio*. It had nothing to do with an appellate waiver.

THE COURT: Counsel, isn't your plea bargain a matter of contract that's an offer and acceptance?

MR. BRITT: It is, your Honor.

THE COURT: And if you don't accept it, that's a decision you have to make. And if you do, the Government is bound by it.

MR. BRITT: Well, your Honor, that's true, but in a sense, it is still a request for a departure when it comes time for sentencing.

THE COURT: Of course, the client doesn't have to plead guilty, you know.

MR. BRITT: I understand that as well, your Honor. The real issue is the constitutionality of the *Brady* and the *Giglio* waiver. She stands before the Court, and as you can see from the letter that was also—I believe there was a letter submitted that your Honor received that—that was the only—that was the issue that she was challenging with respect to the plea agreement. She didn't have a problem of waiving her right to appeal. The real issue was the *Brady*, *Giglio* waiver.

And again, it's—the fast track is a departure which the Court—even if we showed up on the day of sentencing and it was in the agreement, the Court could still say, under 5(k)(2.0), I'm not going to grant a departure. There's no question about that.

THE COURT: That's absolutely right, Counsel. I'm not bound by it.

MR. BRITT: That's exactly right. And that's why we're asking the Court to—

THE COURT: Anything further?

MR. BRITT: Nothing further.

THE COURT: The Court has read and considered the presentence report, the sentencing documents filed on behalf of the Defendant, and the Court finds that the base level of the offense is 18. She gets a credit for minor role of two and acceptance of three, which gives us a 13 over three for sentencing purposes, which provides for an 18 to a 24-month sentence.

I note that probation in the report recommends 21 months and $500 for her addiction drug belief. Therefore—and the Court feels that this is not a proper

case for any departures except for provided for by the regular sentencing procedures. That is a minor role or the role of the Defendant and the acceptance.

And therefore, it's judged the Defendant be committed to the custody of Bureau of Prisons for imprisonment for a term of 18 months. The Court recommends she be given all possible treatment for her drug addiction.

Upon her release, she shall be subject to a three-year term of supervised release, the usual terms and conditions. In addition, she shall not possess firearms, shall submit to search and seizure of her person or personal effects, her home and her automobile on the demand of the supervising officer and shall be subject to drug testing if deemed necessary by the supervising officer during the term of her supervised release.

* * * * *

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No.

UNITED STATES OF AMERICA, PLAINTIFF

v.

*, DEFENDANT

PLEA AGREEMENT

IT IS HEREBY AGREED between the plaintiff, UNITED STATES OF AMERICA, through its counsel, Gregory A. Vega, United States Attorney, and XXXXXX X. XXXXXX, [Special] Assistant United States Attorney, and defendant, *, with the advice and consent of *, [Federal Defenders of San Diego, Inc.], counsel for defendant, as follows:

* * * * *

V.

WAIVER OF RIGHT TO BE PROVIDED WITH IMPEACHMENT AND AFFIRMATIVE DEFENSE INFORMATION

The Government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The Government understands it has a continuing duty to provide such

information establishing the factual innocence of the defendant.

The defendant understands that if this case proceeded to trial, the Government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the Government would be required to provide information in its possession that supports such a defense. In return for the Government's promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information.

* * * * *

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-595

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

ANGELA RUIZ,

RESPONDENT.

S. Ct. U.S.
FILED
DEC 7 2001
CLERK

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 United States Code §3006A(d)(6) and Rule 39 of this Court, Respondent, Angela Ruiz, asks leave to file the attached Brief in Opposition to the United States' Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18 United States Code §3006A in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: 7 December 2001

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

ANGELA RUIZ,

RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO UNITED STATES' PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether before pleading guilty, a criminal defendant has a constitutional right to obtain material exculpatory information, including impeachment material, from the government.

2. If so, whether that right may be waived through a plea agreement.

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-595

UNITED STATES OF AMERICA,

Petitioner,

- v -

ANGELA RUIZ,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
UNITED STATES' PETITION FOR WRIT OF *CERTIORARI*

Respondent Angela Ruiz respectfully requests that the Court deny the Solicitor General's petition for a writ of *certiorari* filed on behalf of the United States.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at United States v. Ruiz, 241 F.3d 1157 (9th Cir. 2001).

JURISDICTION

On March 5, 2001, the Ninth Circuit entered its judgment. The government's petition for rehearing and suggestion for rehearing *en banc* was denied on June 11, 2001. United States' Petition for a

Writ of Certiorari (Pet.), App. at 40a. The government has invoked the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall ... be deprived of life, liberty, or property without due process of law... .

STATEMENT OF THE CASE

On August 13, 1999, Respondent attempted to enter the United States at the Tecate Port of Entry as the driver of a 1970 Mercury Cougar. [ER 9].[1] Hidden in the vehicle were 66.3 pounds of marijuana. [ER 9]. Respondent was arrested and made her first court appearance on August 16, 1999. [CR 3; ER 68].

On August 23, 1999, Respondent was offered a plea agreement. [ER 6-7]. The government's offer consisted of a two page letter providing that Respondent would (1) waive her right to indictment and plead guilty to an information within thirty days of the initial appearance before a magistrate judge; (2) not file or argue any motions; (3) agree to waive her right to appeal the sentencing decision of the district court or otherwise challenge her judgment and sentence; and (4) waive her right to receive certain

[1] "ER" refers to the Excerpt of Record filed in the Court of Appeals. "CR" refers to the district court clerk's docket entries.

Brady[2]/Giglio[3] information. [ER 6-7]. Initially, Respondent did not explicitly reject the government's offer which included a promise on the part of the government to recommend a downward departure from the Sentencing Guideline for participation in the government's "fast-track" disposition program.

The case, however, was subsequently indicted on September 8, 1999. [CR 6; ER 4-5]. Respondent was charged with one count of importing marijuana, in violation of 21 U.S.C. §§ 952 and 960, and one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841. [CR 6; ER 4-5]. Respondent declined to accept the government's "fast-track" offer on the basis of her objection to the requisite waiver of her Brady/Giglio rights. [ER 12]. On October 12, 1999, Respondent entered a guilty plea to a charge of importing marijuana, in violation of 21 U.S.C. §§ 952 and 960. [CR 15; ER 61-64]. There was no plea agreement.

At sentencing, the prosecution opposed a departure for "fast track" stating that the government is "giving up all the benefits that would normally come with the fast track departure." [ER 55; RT 4]. The defense argued that Respondent was entitled to a "fast track departure". [ER 55-56; RT 3-4]. Defense counsel stated, Respondent "did not file any motion [sic]. She did everything that

[2] Brady v. Maryland, 373 U.S. 83 (1963).

[3] Giglio v. United States, 405 U.S. 150 (1972).

someone in her position would normally do but for the disagreement over the language in the standard plea agreement." [ER 54-55; RT 2-3]. The district court stated that a "plea bargain [is] a matter of contract that's an offer and acceptance." [ER 56-58; RT 4-6]. The district court did not make any factual findings and did not grant any departures. [ER 58; RT 6-7]. Respondent was sentenced to a term of 18 months in custody.

Respondent appealed, arguing that the district court had discretion to depart, discretion that it did not acknowledge it had, because the government's insistence on a so-called "Brady/Giglio" waiver constituted unconstitutional conduct on the part of the government. The government argued that while it recognized its continuing responsibility to produce exculpatory evidence of the defendant's actual innocence of the charged offenses, it could constitutionally seek a waiver of a defendant's right to receive material exculpatory evidence that went to impeachment of government witnesses or to any affirmative defense. Brief for Appellee United States at 24.

The Ninth Circuit reversed and remanded for a resentencing hearing. Following its previous decision in Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995), the Ninth Circuit reaffirmed that a criminal defendant has a due process right to receive material exculpatory evidence in the possession of the government prior to entering a guilty plea. Ruiz, 241 F.3d at 1164. Relying

on Sanchez's conclusion that Brady disclosure is essential to a "knowing" and "voluntary" guilty plea, the Ninth Circuit concluded that "[t]he disclosure of Brady evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a plea." Id. The Ninth Circuit further held that the right to this necessary predicate to a voluntary and intelligent plea of guilty could not be waived. Id. at 1164-65.

Judge Tallman dissented, arguing that various policy considerations militated against the constitutional requirement recognized by Sanchez and reaffirmed by the majority opinion. Id. at 1176-77 (Tallman, J., dissenting).

ARGUMENT

In holding that a defendant is entitled to receive Brady/Giglio[4] information -- a limited subset of exculpatory evidence that meets the stringent test of materiality -- prior to entering a guilty plea, the Ninth Circuit joined the Second, Sixth and Tenth Circuits, all of which hold that Brady[5] applies in the

---

[4] Because material exculpatory evidence and material impeachment evidence are constitutionally indistinguishable, see United States v. Bagley, 473 U.S. 667, 676 (1985), both types of evidence will be referred to collectively as Brady information.

[5] Respondent will refer to the Court's decision in Brady v. Maryland, 373 U.S. 83 (1963) as "Brady." When discussing the Court's decision in Brady v. United States, 397 U.S. 742 (1970), respondent will use the full title, "Brady v. United States."

context of a guilty plea. Far from effecting the "radical change in guilty plea practice in the federal system" posited by the government in its petition, Pet. at 7, the Ninth Circuit merely followed the lead of the Second Circuit's approach adopted in Miller v. Angliker, 848 F.2d 1312 (2d Cir. 1988), a decision rendered over a decade ago.

By asking the Court to hold that Brady does not apply in the guilty plea context, the government ignores the facts that it took a contrary position below and that the wealth of lower court opinions refutes its position. Indeed, in holding that Brady applies in the context of a guilty plea, the Second, Sixth, Ninth and Tenth Circuits have carefully applied the Court's decisions analyzing both Brady and the role played by counsel in advising defendants as to which plea to enter. The lower courts have concluded that just as a guilty plea may be invalidated as involuntary and unknowing by defense counsel's failure to discover material exculpatory evidence and advise his client accordingly, the failure of the government to disclose such material evidence similarly renders a plea of guilty involuntary and unknowing by effectively precluding the effective assistance of counsel. Any other result would be anomalous: defense counsel's failure to discover a particular material fact would invalidate the plea while the government's concealment of the same fact would not.

The decisions of the Second, Sixth, Ninth and Tenth Circuits do not conflict with the Court's Brady jurisprudence. None of the Court's decisions applying Brady, all of which have involved convictions by way of trial, have discussed Brady's potential application to convictions secured by way of guilty plea. Thus, the government's suggestion that the rule articulated by these Circuits conflicts with the Court's Brady jurisprudence is incorrect. In fact, consistent with Brady and the role it plays in the context of trial and sentencing, pre-plea Brady disclosure will have the effects of (1) ensuring the reliability of guilty pleas by discouraging the innocent from pleading guilty and (2) preserving the reputation of judicial proceedings by preventing prosecutorial authorities from inducing guilty pleas by withholding exculpatory evidence. On the other hand, the government's current position that it need not disclose any Brady material at all prior to a guilty plea, a position it did not properly present below, unjustifiably increases the risk that innocent but risk-averse defendants will accept favorable plea bargains and needlessly demeans the values underlying the Brady decision itself.

Nor are the government's policy concerns, such as its fear that application of Brady to guilty pleas will necessarily lead to "open file" discovery of non-material and even inculpatory evidence in criminal cases, well taken. Pet. at 7. The Second Circuit has easily rejected a claim that its Brady analysis requires immediate

production of all impeaching material, material or otherwise; its rule applies only to material exculpatory evidence. See In re United States v. Coppa, 267 F.3d 132 (2d Cir. 2001) (reversing district court's broad discovery order but also reaffirming that Brady material must be disclosed prior to any guilty plea).

Finally, the Ninth Circuit correctly concluded that the right to receive pre-guilty plea Brady material cannot be waived. Because a guilty plea must be knowing and voluntary, and a guilty plea entered without Brady disclosure is not knowing and voluntary, Brady disclosure cannot be waived. Morever, the Court has made clear that no "waiver" rationale may be employed where the procedural principles at issue are "so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably discrediting the federal courts." United States v. Mezzanatto, 513 U.S. 196, 204 (1995) (internal quotations, brackets, citations omitted). As a bedrock due process right that is specifically directed "to the reliability of the fact-finding process," id., the right to Brady material cannot be waived.

A. This Case is Not the Appropriate Vehicle to Address the Issues Raised in the Petition Because the Government Failed To Present Its Main Position Below

In its petition for a writ of *certiorari*, the government principally argues that it has no obligation at all to produce Brady material prior to a guilty plea, regardless of whether the

information relates to factual innocence or impeachment. Pet. at 7-9. This argument was presented to neither the district court nor the original three judge panel of the Ninth Circuit.

Rather, the government set forth in its proposed plea agreement that "*[t]he Government understands* it has a continuing duty to provide ... information establishing the factual innocence of the defendant." Appendix D to Government's Petition for a Writ of *Certiorari* at 45a-46a (emphasis added). Similarly, in its Response Brief filed in the Ninth Circuit, the government argued that "[t]he plea agreement acknowledges the Government's duty to disclose 'exculpatory' information indicating actual innocence of the defendant as opposed to 'exculpatory' information which is based in impeachment information." Brief for Appellee United States at 24. It was not until the Petition for Rehearing and Suggestion for Rehearing *En Banc* filed in the Ninth Circuit and the instant petition for a writ of *certiorari* that the government took its current position that it need disclose no Brady material at all prior to a defendant's guilty plea.

The Court does not ordinarily consider issues not properly raised in the lower courts. Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1969) (citations omitted); accord Delta Airlines v. August, 450 U.S. 346, 362 (1981). Pursuant to Rule 15.2 of this Court, respondent objects to the consideration of this question based on the position asserted by the government in the district

court and in the Ninth Circuit. As a result, the petition should be denied because the government's main position was not properly presented to the lower courts.

B. A Guilty Plea Entered In the Absence of the Disclosure of *Brady* Material Is Not Knowing and Voluntary

Brady "hold[s] that the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87 (emphasis added). Thus, only *material* favorable evidence is subject to disclosure. Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); accord Bagley, 473 U.S. at 681-82 (Blackmun, J., sep. op.); id. at 685 (White, J., concurring). Evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different.'" Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting Bagley, 473 U.S. at 682).

Brady itself made clear that the right it described was not limited to trial of issues of guilt: it applies to "evidence [that] is material either to guilt or to punishment." Brady, 373 U.S. at 87 (emphasis added). In Strickler, Justice Souter made clear the breadth of Brady's application to the bifurcated sentencing procedures in that case, procedures which gave both the jury and the trial court a role. "[T]he [Brady] prejudice enquiry does not

stop at the conviction but goes to each phase of the sentencing process: the jury's consideration of aggravating, death-qualifying facts, the jury's discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge's discretionary decision to follow the jury's recommendation." Strickler, 527 U.S. at 297 (Souter, J., concurring in part and dissenting in part) (citing id. at 292-96 (maj. op.)). Thus, although it is true that the Court has yet to address Brady's application to the guilty plea process, it has made it clear that Brady's application is not limited to trial on liability issues alone.

1. The Lower Courts Agree That *Brady* Applies Pre-Plea

The lower courts have, however, addressed the issue and found that Brady is applicable to the guilty plea process. See, e.g., United States v. Persico, 164 F.3d 796, 804 (2d Cir. 1999) ("The Government's obligation to disclose Brady materials is pertinent to the accused's decision to plead guilty; the defendant is entitled to make that decision with full awareness of favorable (exculpatory and impeachment) evidence known to the Government") (citation omitted). While the rationales of the lower courts have varied slightly, each of them analyzes the pre-guilty plea Brady obligation in the context of the Court's decisions in Brady v. United States, 397 U.S. 742, and Hill v. Lockhart, 474 U.S. 52 (1985). For instance, the Ninth Circuit has concluded that a

guilty plea "cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'" Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (quoting Miller, 848 F.2d at 1320). The Second Circuit has offered a slightly different rationale, observing that "even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." Miller, 848 F.2d at 1320.

Whichever rationale is employed, a substantial body of caselaw supports the notion that Brady applies to guilty pleas. See United States v. Walters, 269 F.3d 1207, 1214 (10th Cir. 2001) ("under certain limited circumstances, 'the prosecution's violation of Brady can render a defendant's plea involuntary'") (quoting United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994)); United States v. Ross, 245 F.3d 577, 583 n.1 (6th Cir. 2001) (recognizing that a defendant may file a post-plea Brady claim) (citing Campbell v. Marshall, 769 F.2d 314 (6th Cir. 1985));[6] Tate v. Wood, 963 F.2d

[6] The government suggests that the Sixth Circuit's decision in Campbell is somehow contrary to the Ninth Circuit's approach. See Pet. at 21. Actually, Campbell observed that under this Court's decisions, the petitioner's guilty plea "did not ... insulate all misconduct of constitutional proportions from judicial scrutiny solely because the misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent." Campbell, 769 F.2d at 321. Ultimately, the Campbell court found it unnecessary to resolve the issue of whether Brady applied pre-plea, primarily due to the defendant's inability to demonstrate prejudice. Id. at 323-24. Ross, which the government does not address in its petition, unequivocally states that the Sixth Circuit "has recognized that a state

20, 24-25 (2d Cir. 1992) (material exculpatory evidence must be disclosed prior to the guilty plea); White v. United States, 858 F.2d 416, 423-24 (8th Cir. 1988) (finding that the exculpatory evidence at issue "was significant and ... it should have been disclosed" but habeas relief denied due to lack of materiality); Banks v. United States, 920 F. Supp. 688, 691-92 (E.D.Va. 1996) (following the cases cited herein); United States v. Millan-Colon, 829 F. Supp. 620, 635-36 (S.D.N.Y. 1993), aff'd, 17 F.3d 14 (2d Cir. 1994) (following Miller and Tate);[7] Daniel P. Blank, Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide To Loss, Abandonment and Alienation, 68 Fordham L. Rev. 2011 (2000) (hereinafter "Plea Bargain Waivers"); Erica G. Franklin, Comment,

defendant may raise, *after a plea of guilty*, a claim that prosecutors withhold (sic) exculpatory information in violation of Brady." 245 F.3d at 584 n.1 (emphasis added). Thus, the Sixth Circuit's position is not contrary to that of the Ninth Circuit.

[7] The Ninth Circuit's position also enjoys substantial support in the state courts. State v. Parsons, 775 A.2d 576, 580-81, 341 N.J. Super. 448, 455-56 (2001) (agreeing with Sanchez); State v. Sturgeon, 605 N.W.2d 589, 231 Wis.2d 487 (1999) (allowing withdrawal of guilty plea due to Brady violation); Gibson v. State, 514 S.E.2d 320, 324-25, 334 S.C. 515, 523-24 (1999) (agreeing with Sanchez); State v. Gardner, 885 P.2d 1144, 126 Idaho 428 (1994) (allowing withdrawal of guilty plea due to Brady violation); Villareal v. State, 860 S.W.2d 529, 532-33 (Ct. App. Tex. 1993) ("withholding ... [material] evidence [from a defendant pleading guilty] amount[s] to a denial of [the defendant's] federal and state constitutional rights to due process and due course of law") (citing Ex Parte Lewis, 587 S.W.2d 697, 699-701 (Tex. Crim. App. 1979)); Scroggins v. State, 859 S.W.2d 704 (Mo. App. 1993) ("The principles of Brady are applicable to the entry of a plea of guilty") (citation omitted).

Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers, 51 Stan. L. Rev. 567 (1999); Kevin C. McMunigal, Disclosure and Accuracy In the Guilty Plea Process, 40 Hastings L.J. 957 (1989) (hereinafter "Disclosure and Accuracy").*

Thus, although the government complains that the Ninth Circuit's decision is "unique," Pet. at 20, when compared to other lower court authority, it glosses over the fact that the overwhelming weight of this authority refutes its position that Brady does not apply in the guilty plea context. Moreover, the government's contention that no other court "has gone as far" as the Ninth Circuit is a red herring, Pet. at 22, as no other court has had the opportunity to address the issue of Brady waivers in plea agreements. In other words, no court has disagreed with the Ninth Circuit's invalidation of Brady waivers. If anything, the fact that no other court has had the opportunity to address the

* The Fifth Circuit, in dicta, has suggested that the right recognized in Brady was solely trial-based, see Matthew v. Johnson, 201 F.3d 353, 360 (5th Cir.), cert. denied, 531 U.S 830 (2000), although even that court acknowledges that the contrary view enjoys wide support. See id. at 358. The facts that Brady explicitly held that its rule applies to the issues of both liability and punishment, 373 U.S. at 87, and that Bagley makes clear that the Brady materiality test requires analysis of whether the "result of the *proceeding* would be different," 473 U.S. at 682 (emphasis added), rather than solely whether the result of the *trial* would have been different, refute the Fifth Circuit's suggestion that the right recognized in Brady was solely trial-based.

specific issue weighs against granting the petition. Rather than granting the petition at this time, the Court should have the benefit of other lower court opinions on the specific issue and should also wait to see if a conflict ever arises.

2. ***Hill v. Lockhart* Supports The Conclusion That A Plea Entered Without Disclosure of Material Exculpatory Evidence Is Involuntary**

In addition to its reliance on the decisions of its sister Circuits, the Ninth Circuit has explained that a guilty plea entered without disclosure of material exculpatory evidence is involuntary. See Sanchez, 50 F.3d at 1453; accord Walters, 269 F.3d at 1214 ("under certain limited circumstances, 'the prosecution's violation of Brady can render a defendant's plea involuntary'"). The government argues that the Ninth Circuit's analysis of Brady v. United States overlooks the Court's observation that "'[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.'" Pet. at 13 (quoting Brady v. United States, 397 U.S. at 756-57). As a result, the government argues, even though "'a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecutor's case,'" Sanchez, 50 F.3d at 1453 (quoting Miller, 848 F.2d at 1320), and even though the decision-making process may be adversely

affected by the lack of disclosure of Brady material, the validity of the guilty plea is not implicated because the guilty pleas of defendants who "misapprehend[] the quality of the State's case or the likely penalties," Brady v. United States, 397 U.S. at 756-57, are nonetheless valid.

The government's argument ignores Hill v. Lockhart, 474 U.S. 52, which strongly supports the Ninth Circuit's view that a guilty plea entered in the absence of Brady disclosure is "involuntary" under Brady v. United States, as well as the Court's other decisions assessing the validity of convictions entered by way of guilty pleas. The Court's cases emphasize the role of the advice of counsel in establishing that guilty pleas are voluntarily and intelligently made. See Brady v. United States, 397 U.S. at 758; accord Tollett v. Henderson, 411 U.S. 258, 267 (1973); McMann v. Richardson, 397 U.S. 759, 771 (1970). The Court made clear in Hill, however, that "[w]here, as here, a defendant is represented by counsel during the guilty plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" 474 U.S. at 56 (quoting McMann, 397 U.S. at 771). Thus, a plea of guilty based upon sub-standard advice is involuntary and therefore invalid. Id.; accord McCarthy v. United States, 394 U.S. 459, 466 (1968) ("if a defendant's guilty plea is not equally voluntary and knowing, it

has been obtained in violation of due process and is therefore void") (footnote omitted).

In explicating the "prejudice" inquiry to be undertaken in a case where a defendant asserts a claim that his plea is involuntary due to ineffective assistance of counsel at the plea stage, Hill employed defense counsel's failure to uncover exculpatory evidence as an illustration.

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Hill, 474 U.S. at 59. Based on this analysis, the failure of counsel to discover a particular exculpatory fact - a fact which would likely cause counsel to advise rejection of a plea agreement - renders the guilty plea violative of the Sixth Amendment and therefore involuntary.

The Ninth Circuit's pre-plea Brady analysis is based upon an analogy to Hill's Sixth Amendment analysis: "[e]vidence is 'material' if 'there is a reasonable probability that but for the failure to disclose the Brady material, the defendant would have refused to plead and would have gone to trial.'" United States v. Ruiz, 241 F.3d 1157, 1166 (9th Cir. 2001) (quoting Sanchez, 50 F.3d

at 1454).[9] Sanchez relied on Miller in adopting this test. See Sanchez, 50 F.3d at 1454 (citing Miller, 848 F.2d at 1322).

The Second Circuit's adoption of the foregoing test was informed by the Court's derivation of the post-trial Brady test. In Bagley, Justice Blackmun's separate opinion, joined by a majority of the Court, adopted the Sixth Amendment materiality test established in Strickland v. Washington, 466 U.S. 668, 694 (1984), as applicable to post-trial Brady claims. See Bagley, 473 U.S. at 681-82 (Blackmun, J., sep. op.); accord id. at 685 (White, J.,

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[9] The government insists that the Ninth Circuit's analysis logically compels the conclusion that the government must turn over not only material exculpatory evidence, but also inculpatory evidence in order for the defendant to maximize his knowledge of the government's case prior to pleading guilty and that this sort of broad disclosure is inconsistent with the Court's cases. Pet. at 14-15. Quite to the contrary, the Ninth Circuit's materiality test can *never* require the disclosure of inculpatory evidence: no defendant could ever claim that "but for the failure to disclose [even more inculpatory evidence], [he] would have refused to plead and would have gone to trial.'" Ruiz, 241 F.3d at 1166. Moreover, the government's concerns, which are based on the Ninth Circuit's observation that "'a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the government's case," id. at 1164, ignore the limitations inherent in the Brady doctrine: the Ninth Circuit's analysis, like that of the Second Circuit, requires no more than the disclosure of material exculpatory evidence. See Coppa, 267 F.3d at 142. While guilty pleas would no doubt be even more "knowing" and "voluntary" if all evidence were disclosed, including inculpatory evidence, the Ninth Circuit's rule applies to Brady material alone. See Ruiz, 241 F.3d at 1164 (requiring production of "material information withheld by the prosecution"). At any rate, much of the government's inculpatory evidence is already otherwise discoverable, upon request, under Fed. R. Crim. P. 16. Thus, the government's objections are both unfounded and overstated.

concurring). The Sixth Amendment basis for the Brady materiality test was later reaffirmed in Kyles. See 514 U.S. at 433-34.[10] In view of the Court's emphasis on its Sixth Amendment jurisprudence in evaluating Brady due process claims, the Second Circuit concluded that Sixth Amendment concepts were equally applicable to pre-plea Brady claims.

> [W]e consider it useful in the present case to look to the Supreme Court's discussion of materiality in Hill v. Lockhart, . . . which involved a claim that the defendant's decision to enter a plea of guilty was caused by the ineffective assistance of his counsel.

Miller, 848 F.2d at 1322. Thus, Miller adapted Hill's Sixth Amendment test to a due process Brady claim and concluded that the Brady test should focus on whether the undisclosed evidence created a "reasonable probability" that the defendant "would have insisted on going to a full trial." Id.[11]

Rejection of the analysis contained in Hill and adoption of the government's approach would lead to anomalous results. For

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[10] Strickland itself derived its test from United States v. Agurs, 427 U.S. 97, 104, 112-13 (1976) and United States v. Valenzuela-Bernal, 458 U.S. 858, 872-74 (1982), both of which are Fifth Amendment cases. See Strickland, 466 U.S. at 694. Strickland's derivation of its test only serves to emphasize the inter-relatedness of the Fifth and Sixth Amendment questions posed by the failure of the government to disclose, and of defense counsel to discover, material exculpatory information.

[11] A hypothetical illustrates this point. If defense counsel's failure to learn that a key witness had suffered a conviction of perjury would violate the Sixth Amendment under Hill, then the government's failure to disclose that a significant unidentified witness had suffered that same conviction violates the Fifth Amendment.

example, in Jacobson v. United States, 503 U.S. 540 (1992), the Court found that Jacobson had been entrapped as a matter of law into receiving visual depictions of minors engaging in explicit sexual acts due to the conduct of various government agencies in soliciting orders from him. If Jacobson had entered a guilty plea without knowing that those who solicited him were government actors, thereby foregoing his entrapment defense, the question of whether his plea was voluntary or not would depend - under the government's approach -- solely on whether or not his counsel should have discovered the fact that the solicitors were government agents. If counsel should have discovered that fact, Jacobson's plea would be involuntary because he pleaded guilty without knowing a fact reasonably likely to cause him to go to trial: the availability of an entrapment defense. See Hill, 474 U.S. at 59. By the same token, if the government had successfully concealed the identity of the solicitors, such that counsel could not have discovered it, Jacobson's plea would suddenly be voluntary.

It would be bizarre indeed if the voluntariness of Jacobson's plea were to depend upon the government's skill at concealing material exculpatory facts. Hill, 474 U.S. at 56, makes clear that a plea is not voluntary if the defendant is kept in the dark as to material exculpatory facts; it should not matter who is at fault for the defendant's ignorance. In other words, the identity of the responsible party is not logically related to the voluntariness of the defendant's plea. If defense counsel is at fault, then the Sixth Amendment provides relief under Hill. But if it is the

government that has failed to disclose the information, then Brady's Fifth Amendment analysis should apply. See Ruiz, 241 F.3d at 1165 (analogizing to ineffective assistance of counsel claims in concluding that "the failure to disclose Brady evidence ... invalidates the plea agreement").[12]

The Second Circuit took a slightly different approach, reasoning that the failure to disclose Brady information prior to a guilty plea could invalidate that plea because Brady v. United States applied "only in the absen[ce] of misrepresentation or other impermissible conduct by state agents." Miller, 848 F.2d at 1320 (citing Brady v. United States, 397 U.S. at 757). Because the non-disclosure of material exculpatory evidence constitutes "impermissible conduct by state agents," Miller held "that even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material

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[12] The government's conduct in withholding material exculpatory evidence that cannot be discovered by defense counsel would have the effect of preventing counsel from offering adequate advice at a critical stage of the prosecution. See Williams v. Kaiser, 323 U.S. 471, 475-76 (1945) (the assistance of counsel is fundamental to the decision to plead guilty because "[o]nly counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate"). Because "'[t]he right to counsel is the right to the effective assistance of counsel,'" Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970)), the government would essentially prevent the defendant's exercise of his Sixth Amendment right to counsel. "The Court has uniformly found constitutional error ... when counsel was ... prevented from assisting the accused during a critical stage of the proceeding. United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) (collecting cases).

evidence withheld by the prosecution." Id. Thus, the Second Circuit posited a pre-plea Brady obligation, but it did not apply Hill's voluntariness analysis, instead concluding that a Brady violation satisfied the misconduct exception recognized by Brady v. United States.

Even so, the Second Circuit relied upon Hill's prejudice analysis to determine materiality, Miller, 848 F.2d at 1322, the same test the Ninth Circuit adopted. See Ruiz, 241 F.3d at 1166. Thus, even though the Second and Ninth Circuits applied somewhat different approaches to Brady v. United States, both agreed that Hill's analysis was nonetheless applicable. This minor analytical divergence is of no moment, however, as there is no disagreement between the Second and Ninth Circuits on whether or not Brady applies pre-plea: both correctly hold that it does. See Coppa, 267 F.3d at 142 ("Brady material must be disclosed in time for its effective use ... at a plea proceeding"); Ruiz, 241 F.3d at 25 (describing the right to receive pre-plea Brady material as a "due process right").

3. The Principles Underlying *Brady* Support Its Application Pre-Plea

a. Pre-plea *Brady* disclosure advances the interest in accuracy of guilty pleas and the goals of fairness and legitimacy in the criminal justice system

Even if the Court declines to adopt the Ninth Circuit's analysis of Hill, the Second and Ninth Circuits have nonetheless correctly concluded that due process requires pre-plea Brady

disclosure because such disclosure serves to ensure the reliability of convictions entered by way of guilty plea and to advance the goals of fairness and legitimacy in the criminal justice system. First, the disclosure of material exculpatory evidence will tend to encourage innocent, but risk averse, defendants to exercise their trial rights rather than to plea bargain, thus vindicating the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Because such defendants are likely to receive more attractive plea offers,[13] disclosure will serve to bolster those innocent defendants who are more likely to succumb to a substantial difference in potential penalty.[14]

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[13] Defendants with a more significant chance of acquittal are likely to receive more attractive offers from prosecutors who are risk averse. See generally Disclosure and Accuracy, 40 Hastings L.J. at 990-92.

[14] While cases of innocent defendants pleading guilty are difficult to identify, some have come to light. See, e.g., Paul Duggan, 13 Years After a Murder, DNA Gives Texan Freedom; Bush's Office Ignored Confession By Another, Washington Post Service, Jan. 18, 2001, News Section at 3 (man who entered guilty plea exonerated); Matt Lait and Scott Glover, 4th Inmate Expected to Be Freed[;] Rampart: Widening Police Scandal May See 40 or More Convictions Overturned, Los Angeles Times, Metro Desk, 1999 WL 26200706, November 30, 1999 (same); see also Barry Scheck et al, Actual Innocence 92 (2000) (noting that 23% of the DNA exonerations studied by the Innocence Project were based on false confessions or admissions).

Second, disclosure will also serve to prevent miscarriages of justice in cases involving offenses containing elements that are either outside the defendant's knowledge or are based upon application of objective standards. As for the former category of offenses, numerous crimes contain elements that are outside the defendant's personal knowledge. For example, a number of offenses require that the victim have attained a certain age. A defendant may well not have personal knowledge of the victim's age and lack access to evidence that calls that element into question, evidence that the government may possess due to its superior access to the victim or to confidential public records. Similarly, in a bank robbery case, see 18 U.S.C. § 2113(a), a defendant would typically lack any personal knowledge of the FDIC insurance element that the government may possess. Even the availability of certain defenses may turn on facts outside the defendant's knowledge, as is the case in entrapment, in which the defendant may not know that the person who solicited him was a government agent. In these hypotheticals, the defendant lacks conclusive knowledge of his guilt or innocence, thus making pre-plea disclosure of exculpatory evidence even more significant. See generally Disclosure and Accuracy, 40 Hastings L.J. at 972-75 (describing situations in which the defendant lacks sufficient knowledge accurately to determine his guilt).

As to the latter category, numerous defenses and offense elements turn on the analysis of objective factors, such as the

reasonableness of one's conduct or the justifiability of a particular course of conduct. See generally Disclosure and Accuracy, 40 Hastings L.J. at 976-80 ("It is problematic to expect the typical defendant pleading guilty to provide accurate answers to questions such as the reasonableness of the defendant's conduct or belief, or the justifiability of taking a particular risk, in the same way that we rely on a defendant pleading guilty to reveal the truth about his own conduct or subjective mental state"). Again as an example, a claim of self defense frequently requires a showing of the reasonableness of the defendant's fear, an objective fact that could be corroborated by facts of which the defendant was unaware. See, e.g., United States v. James, 169 F.3d 1210, 1214-15 (9th Cir. 1999) (defendant's self defense theory was corroborated by documentary proof of victim's prior violent acts even though the defendant had never reviewed the documents). Because "[s]elf-defense is about as basic a moral and legal principle there is," id. at 1215 (citation omitted), no legitimate policy could be served by allowing James to enter a guilty plea without disclosure of the documents which corroborated the victim's violent past had she been unaware of them and had the government possessed them. Objective determinations are frequently required in offense elements as well. See, e.g., 8 U.S.C. § 1324(a)(1)(ii), (iii) and (iv) (permitting liability for various alien smuggling offenses

based upon the defendant's "reckless disregard" of the illegality of the alien's presence in the United States).[15]

Finally, non-disclosure implicates the fairness considerations that animated Brady. "[O]ur system of the administration of justice suffers when any accused is treated unfairly." Brady, 373 U.S. at 87. "[D]isclosure will serve to justify trust in the prosecutor as the representative ... of a sovereignty ... whose interests in a criminal prosecution is not that it shall win a case, but that justice shall be done." Kyles, 514 U.S. at 439 (quotation omitted). A constitutional rule permitting the suppression of *all* Brady material gives rise to a prosecutorial incentive "'to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas,'" Ruiz, 241 F.3d at 1164

[15] In Henderson v. Morgan, 426 U.S. 637 (1976), the Court considered a case involving a homicide statute which permitted a finding of increased liability based upon what was apparently a purely objective standard. Henderson involved a homicide in which a second degree murder charge was filed, but the defense contended that a manslaughter charge was more appropriate under the facts, including the defendant's limited mental abilities. The second degree murder charge, however, included as an element the requirement that the "assault was committed with a design to effect the death of the person killed." Id. at 645 (internal quotations, footnotes omitted). The Court observed that the crucial "element of the [second degree murder] offense might have been proved by the objective evidence *even if respondent's actual state of mind was consistent with innocence or manslaughter.*" Id. (emphasis added). Thus, the existence of objective evidence - of which the defendant may not have been aware - may have been dispositive. The failure to disclose exculpatory evidence relevant to the application of this objective standard could lead to a plea of guilty by a defendant whose "actual state of mind was consistent with innocence or manslaughter." Id.

(quoting Sanchez, 50 F.3d at 1453), and demeans the values underlying Brady.[16]

b. **The Court should not create a pre-plea exception to Brady based upon the government's policy arguments**

The government advances a number of policy justifications for its request that the Court allow it to withhold *all* Brady material from defendants considering guilty pleas. Ruiz's holding, however, is constitutional; it cannot be rejected solely upon reconsideration of the policy implications of the decision. See Ruiz, 241 F.3d at 1167-68. Nevertheless, the government's arguments are unconvincing.

[16] In the event that the Court rejects the Ninth Circuit's analysis of Hill and the application of Brady prior to entry of a guilty plea, the Court should nonetheless exercise its supervisory power to require such disclosure. See, e.g., Jencks v. United States, 353 U.S. 657 (1957) (exercising the Court's supervisory power to order discovery of the prior statements of witnesses); Roviaro v. United States, 353 U.S. 53 (1957) (exercising supervisory power to order discovery regarding informants under some circumstances); see also United States v. Campbell, 874 F.2d 838, 851 (1st Cir. 1989) (characterizing Jencks and Roviaro as involving the exercise of the Court's supervisory power); United States v. Fischel, 686 F.2d 1082 (5th Cir. 1982) (same as to Roviaro). The analysis in the foregoing section supports the exercise of this Court's authority. In addition, the "[f]ederal courts have an independent interest in ensuring criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160 (1988). By requiring such disclosure, the Court will hold prosecutors to high ethical standards and enhance fairness.

For instance, the government rejects any notion that pre-plea Brady disclosure would serve to discourage the innocent from pleading guilty, asserting that in any post-conviction proceeding

> [t]he essence of a defendant's Brady claim at that point is not that his solemn admissions of guilt were false. Instead, the claim is that, if the government had disclosed a particular piece of evidence, the defendant would have recalculated the risks and benefits of his options and opted to go to trial rather than pleading guilty.

Pet. at 18-19. As a threshold matter, the government's argument, as set forth above, is difficult to reconcile with Hill. Presumably, the government would also seek to dismiss the claim of a criminal defendant raising ineffective assistance of counsel by arguing that the essence of such a claim was not innocence but rather a desire to "recalculate[] the risks and benefits of his options," albeit with better advice. The Court rejected that sort of reasoning in Hill, concluding that the claim went to the validity of the plea: a plea based on such advice was not voluntary. Hill, 474 U.S. at 56; accord McCarthy, 394 U.S. 466. The same analysis should apply here: regardless of the government's (apparently omniscient) view that a defendant making a post conviction attack does not also assert his innocence, the non-disclosure of Brady material invalidates the plea by rendering it involuntary. An involuntary plea violates due process and is void, whether or not there is also a claim of innocence asserted. Hill, 474 U.S. at 56; accord McCarthy, 394 U.S. 466.

The government's concern for the finality of judgments, Pet. at 19, is also addressed in Hill, which concluded that "requiring a showing of 'prejudice' from defendants who seek to challenge the validity of guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas." Hill, 474 U.S. at 58 (citation omitted); see also Strickland, 466 U.S. at 694 ("[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker"). Because any successful Brady claim includes, by definition, a showing of materiality, see Strickler, 527 U.S. at 281-82, the pre-plea disclosure rule adopted by the lower courts provides precisely the same assurance that the finality of judgments will not be unnecessarily disturbed.

But even apart from the analogy to Hill, the government's assertion that all post-conviction Brady claims are not, in essence, claims of innocence overstates the efficacy of the guilty plea process in separating the innocent from the guilty. While it is true that the Court views plea bargaining as "not only an essential part of the process but a highly desirable part," Santobello v. New York, 404 U.S. 257, 261 (1971), the Court has also acknowledged that it cannot "say that guilty plea convictions

hold no hazards for the innocent." Brady v. United States, 397 U.S. at 757.[17] In Brady v. United States the Court observed that

> we take great precautions against unsound results, and we should continue to do so whether the conviction is by plea or trial. We would have serious doubts about this case if the encouragement of guilty pleas by offer of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.

Id. Although in Brady v. United States the Court expressed confidence that trial "courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel," id., the government now proposes a rule that can only undermine that confidence. Essentially, the government urges the Court to enable it to deny defendants the very information defense counsel needs to provide "adequate advice:" material exculpatory evidence. If it were true that "guilty plea convictions [held some] hazards for the innocent," when Brady v. United States was decided, those hazards will be greatly increased in the event the government's view

[17] Moreover, to the extent that the government focuses on a defendant's effort to disown his previous sworn declarations of guilt, that concern is completely absent in cases where a nolo contendere plea is entered, see Fed. R. Crim. P. 11(b), or when the defendant pleads guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), without providing a factual basis. Even where there is a factual basis provided, Hill, 474 U.S. 52, still provides a basis to challenge a guilty plea: it contains no "factual basis" exception. See also Fed. R. Crim. P. 32(e) (permitting guilty plea to be withdrawn prior to sentencing for "any fair and just reason" and also containing no "factual basis" exception).

prevails, and it gains the ability to withhold material exculpatory evidence from defendants contemplating guilty pleas.

In addition to its view that application of Brady to guilty pleas will somehow not advance the interests of innocent defendants, the government also insists that the lower courts will not be able to confine the requisite disclosures to material exculpatory evidence. Pet. at 14-15. The government's fear is unfounded. The Second Circuit has already rejected a district court's discovery order that went beyond the scope of the general rule that Brady material must be disclosed prior to a guilty plea, reasoning that "we have never interpreted due process of law as requiring more than that Brady material must be disclosed in time for its effective use at trial ... or at a plea proceeding...." Coppa, 267 F.3d at 142 (citations omitted). The Brady materiality standard, as applied in Coppa, simply obviates the government's concerns that it might be required to conduct open file discovery.

The government also fears that the Ninth Circuit's approach "could endanger government witnesses, disrupt ongoing investigations, and require additional commitment of scarce resources to cases before entry of guilty pleas." Pet. at 23. The government again overlooks the strict limitations imposed by the materiality requirement. Ruiz does not require the wholesale disclosure of the identities of informers, although occasionally it may. Sanchez illustrates this point: Mr. Sanchez did not prevail

because his assertion that he would have pursued entrapment and outrageous governmental misconduct claims if he had known the identities of the informants was rejected because it was not objectively reasonable. See 50 F.3d at 1454. Therefore, the evidence he was denied was neither material nor subject to disclosure. Id. In those few cases where the information is material, such as those where a defendant who is not predisposed to commit drug offenses is induced to do so by a government informant, the balance, as tilted by the antecedent determination of materiality, properly favors disclosure.[18]

Finally, the argument that Ruiz creates a burden on prosecutors by requiring them to collect and assess evidence at an earlier stage in order to determine if it constitutes Brady material is equally unavailing. As an initial matter, the government appears to concede that its prosecutors already look for and disclose exculpatory evidence before guilty pleas, as it repeatedly states that it is only "impeachment" information that it does not routinely disclose. Pet. at 9, 23. Until now, there have

[18] The government has provided no evidence that the absence of Brady waivers will have a devastating impact on criminal investigations. See Mezzanatto, 513 U.S. at 209 n.6 ("Respondent has failed to offer any empirical support for his apocalyptic predictions"). There is also no evidence that Brady waivers are common, even though the government's claimed concerns certainly are. In other words, if a controversial Brady waiver was so vital to the government's investigations, this issue likely would have been raised long before the instant case.

been no complaints that prosecutors have been overburdened by their efforts to disclose such exculpatory information pre-plea, and certainly the system has not come to a grinding halt based on these pre-plea efforts.

Also, the government's complaint about having to do more work at the initial stages of a case conflicts with its contentions regarding finality. Certainly, finality concerns are better addressed by a rule which requires early disclosure. Such a rule eliminates post-conviction claims when exculpatory information comes to light well after resolution of a case. The government's concern about the plea bargaining process also "focuse[s] entirely on [its] incentives and completely ignores the other essential party to the transaction: the [defendant]." Mezzanatto, 513 U.S. at 207. While a prosecutor may wish to do even less work in a plea bargain case, a defendant is often less likely to accept a plea agreement where he must give up his right to receive exculpatory information, as exemplified by what happened in this very case. Indeed, Brady waivers have inhibited the plea bargaining process in various judicial districts. See Plea Bargain Waivers, 68 Fordham L. Rev. at 2043-44 and n.189 (detailing the impasse created in the Northern District of California by the government's effort to require waivers similar to the one at issue here).

Moreover, the government will not dispute that the "fast-track" plea bargain program in the Southern District of California

has survived in the wake of Ruiz. That program has proceeded in the same fashion, simply without the inclusion of Brady waiver provisions in the plea agreement. And, the government cannot claim that there has been an alarming slow down in prosecutions in the Ninth Circuit because prosecutors are now so busy spending their time looking for impeachment information before a defendant pleads guilty.

To the extent that Brady waivers relieve prosecutors of their duty to collect and evaluate potential Brady evidence, due process concerns are demeaned. See Strickler, 527 U.S. at 280 ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police"). As to any claim of difficulty in assessing such information pre-plea, Kyles counsels prosecutors to err on the side of disclosure. 514 U.S. at 439 ("Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on the trial's outcome as to destroy confidence in its result"). There is no reason to believe that the pre-plea Brady test is any more difficult to apply than the post-trial test; the government "cannot avoid [its] responsibility" to ensure that guilty pleas are entered knowingly and voluntarily. Id.

C. **The Right To Pre-Plea Brady Disclosure Cannot Be Waived Because It Is A Necessary Incident to a Knowing and Voluntary Plea and Because Such Disclosure Is Fundamental to the Reliability of the Fact-Finding Process**

The government also contends that, even if a defendant has a right to receive Brady information before pleading guilty, that right can be waived. Pet. at 15-16. As an initial matter, the government appears to concede that if disclosure of Brady information is necessary to a knowing and voluntary guilty plea, then the right to receive such information cannot be waived in a plea agreement. Indeed, the government does not challenge the Ninth Circuit's holding in this regard and instead simply relies upon its position that the disclosure of Brady information is not a prerequisite to a knowing and voluntary guilty plea. Id. at 15. Of course, respondent has shown that the disclosure of such information is necessary to a knowing and voluntary guilty plea, and therefore further consideration of the "waiver" issue is unnecessary given the government's concession, a concession that is well taken. See McCarthy, 394 U.S. at 459 ("if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void"); Waley v. Johnston, 316 U.S. 101, 104 (1942) (if a guilty "plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction").

Nevertheless, even if this Court finds that disclosure of Brady information is not required to ensure a knowing and voluntary guilty plea, the right to receive such information still cannot be waived pursuant to a plea agreement.[19] While the government correctly states that the Court has recognized that many fundamental rights are waivable, see Mezzanatto, 513 U.S. at 201, it incorrectly contends that the right to receive Brady information is indistinguishable from such waivable rights. Pet. at 16. Instead, the right to receive Brady information is one of those rights that "are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discrediting the federal courts.'" Mezzanatto, 513 U.S. at 204 (citation omitted).

Unlike the right in Mezzanatto, which was found to be waivable because it involved the suppression of evidence and therefore did

[19] The government contends that if the right to receive Brady information in the guilty plea context is not rooted in the requirement of a knowing and voluntary guilty plea, then it could only be rooted "in an expansion of the due process holding in Brady itself . . . ." Pet. at 16. For reasons explained earlier, this contention is doubly flawed. First, the right to receive exculpatory information in the guilty plea context does not require an *expansion* of Brady, as the government readily conceded in the district court and in the Ninth Circuit. Second, even if the Due Process holding in Brady somehow did not apply in the guilty plea context, this Court can create such a right pursuant to its supervisory powers. Whether the right to receive exculpatory information in the guilty plea context is based in the Due Process Clause or this Court's supervisory powers, the following discussion of waiver is equally applicable.

not enhance the search for truth, id. at 204-05, the right to receive Brady information involves the disclosure of material evidence and therefore "*enhances* the truth-seeking function" of the federal criminal justice system. Id. at 204 (emphasis in original). To ensure this truth-seeking function, which is essential to the credibility of the federal courts, our guilty plea "system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties . . . ." Id. at 205 (quoting United States v. Olano, 507 U.S. 725, 742 (1993) (Kennedy, J., concurring)). Indeed, because Brady does not simply bestow personal rights upon a defendant but also imposes obligations upon prosecutors that are designed to protect the integrity and truth-seeking purpose of the criminal justice system as a whole, see Kyles, 514 U.S. at 439, a defendant and a prosecutor cannot simply waive the decision's applicability in a plea agreement. Cf. Peretz v. United States, 501 U.S. 923, 937 (1991 ("a litigant may not waive structural protections"); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704 (1945) (private rights "charged or colored with the public interest" cannot be waived where waiver will defeat public interest).

In short, the credibility of the federal courts would be irreparably discredited by a rule which permitted the parties to avoid structural protections set forth by this Court to ensure the integrity of the criminal justice system as a whole. Of course,

the specific consequence of this end-run around these structural protections is the unsettling reality that federal courts could accept guilty pleas while prosecutors silently stand by knowing that there is information pointing to innocence.[20]

Finally, in half of a sentence, and without citation to authority, the government appears to assert the position it articulated below, a position that appears to have been otherwise abandoned at this stage of the proceedings. Specifically, it contends that waiver should be allowed "particularly with respect to the subset of information relating not to substantive evidence of guilt, but to the credibility of government witnesses." Pet. at 16. It is not surprising that this argument is without citation to authority and has now been relegated to half of a sentence, as the Court has definitively "rejected any such distinction between impeachment evidence and exculpatory evidence." Bagley, 473 U.S. at 676. In sum, the right to receive all exculpatory information, including impeachment information, cannot be waived in a plea agreement.

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[20] Not only is a non-waiver rule necessary to maintain the integrity of the federal courts and "some minimum of civilized procedure[,]" Mezzanatto, 513 U.S. at 204 (quoting United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985)), but it is also required under other legal doctrines, such as contract and property law. See Plea Bargain Waivers, 68 Fordham L. Rev. at 2060-85 (discussing the doctrines of unconstitutional conditions, contract, property, and procedural due process in concluding that Brady rights cannot be waived).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Dated: December 7, 2001

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-595

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

ANGELA RUIZ,

RESPONDENT.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

ANGELICA HERNANDEZ, being first duly sworn, deposes and says: That pursuant to Rule 29.4(a) of this Court he served the within Brief in Opposition to the United States' Petition for Writ of Certiorari on the counsel for Petitioner by enclosing a copy thereof in an envelope, First Class Postage Prepaid, addressed to Theodore Olsen, Solicitor General of the United States, ATTN: Irving Gornstein, Assistant to the Solicitor General, Department of Justice Washington, D.C. 20530-0001; and included an original and ten (10) copies to Hon. William K. Suter, Clerk United States Supreme Court, 1 First Street, NE Washington, D.C. 20530 and depositing same in the United States mails at San Diego, California on December 7, 2001.

Angela Hernandez

ANGELICA HERNANDEZ, Affiant

Subscribed and Sworn to before me
this 7th day of December, 2001.

LEE ANN HUDSON
COMM. # 1249146
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
COMM. EXP. JAN. 11, 2004

Lee Ann Hudson

Notary Public in and for said
County and State.

Supreme Court, U.S.
FILED
DEC 21 2001
CLERK

No. 01-595

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 01-595

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

A. The Question Whether A Defendant A Has Constitutional Right To Obtain Exculpatory Material Before Pleading Guilty Is Properly Presented

Respondent contends (Br. in Opp. 8-10) that the question whether a criminal defendant has a right to obtain exculpatory information before pleading guilty is not properly presented. In particular, she argues that the government acknowledged in the district court and before the court of appeals panel that it had a duty to turn over information relating to factual innocence, and challenged only its obligation to turn over the subset of exculpatory material relating to impeachment, thereby waiving its right to petition on the broader issue.

This Court's "traditional rule," however, "precludes a grant of certiorari only when the question presented was not pressed *or* passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (emphasis added). That rule "operates (as it is phrased) in the disjunctive,

permitting review of an issue not pressed so long as it has been passed upon." *Ibid.*

The court of appeals in this case clearly "passed upon" the broader question framed by the government's petition—whether a criminal defendant has a right to obtain exculpatory material before pleading guilty. In the part of its opinion entitled "Wavier of *Brady* Rights in General," Pet. App. 8a, the Ninth Circuit expressly reaffirmed its holding in *Sanchez* v. *United States*, 50 F.3d 1448, 1453 (1995), that "guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution," Pet. App. 9a. It further held in that part of the opinion that the rationale of *Sanchez* "applies with equal force to plea agreements," and, accordingly, that "plea agreements, and any waiver of *Brady* rights contained therein, cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." *Id.* at 10a. After resolving that general question, the panel went on in a separate part of its opinion entitled "Waiver of Impeachment Evidence" to reject any distinction between exculpatory information relating to factual innocence and exculpatory information relating to impeachment. *Id.* at 13a-16a. Because the court of appeals "passed upon" the general question whether a criminal defendant has a constitutional right to obtain exculpatory material before pleading guilty, that question is properly presented.

Moreover, the government acknowledged in the district court and before the panel that it had a duty to turn over exculpatory evidence relating to factual innocence only because the Ninth Circuit's prior decision in *Sanchez* had established such a duty, and that decision was binding on the district court and the panel. Once

the panel rejected the government's effort to limit *Sanchez* to non-impeachment material, the government sought rehearing en banc on the general question whether a criminal defendant has a right to obtain exculpatory material from the government before pleading guilty. In light of *Sanchez*, the government raised that question at the first available opportunity.

In any event, this Court is always free to decide a question that is logically antecedent to one presented below. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 382-383 (1995). That is the situation here. If the government has no duty to turn over any exculpatory material to a defendant before he pleads guilty, it follows that it has no duty to turn over the sub-class of such material that relates to impeachment.

This Court has addressed questions not pressed below in circumstances that make clear that there is no obstacle to the Court's consideration of the first question presented in this case. In *Williams*, the Court addressed the question whether an indictment may be dismissed because the government did not present exculpatory evidence to the grand jury, even though the government did not raise that question in the court of appeals. 504 U.S. at 40-43. The Court explained that it will decide an issue that is not pressed below "so long as it has been passed upon," *id.* at 41, and that the court of appeals had clearly "decided the crucial issue of the prosecutor's duty to present exculpatory evidence," *id.* at 43. The Court added that there was binding circuit precedent on the question presented at the time the government took its appeal, and the government had no obligation to "demand overruling of a squarely applicable, recent circuit precedent," which had rejected the government's position, as a precondition to raising the issue in this Court. *Id.* at 44.

In *Lebron*, the Court addressed petitioner's contention that Amtrak is a public entity even though petitioner had "expressly disavowed" that argument in both the district court and the court of appeals. 513 U.S. at 378-383. As in *Williams*, the Court observed that the issue "was addressed by the court below," and this Court's practice permits review of an issue not pressed "so long as it has been passed upon." *Id.* at 379. The Court also went on to emphasize that the argument regarding Amtrak's status as a public entity was a "prior question" to the one presented below, and that the Court was therefore free to consider it. *Id.* at 381-382.

The considerations that led the Court to address the questions presented in *Williams* and *Lebron* are also present here. The first question presented in the government's petition is therefore properly presented.

B. The Ninth Circuit's Ruling Conflicts With This Court's Decisions

Respondent erroneously argues (Br. in Opp. 10-11) that the court of appeals' decision is supported by *Brady* v. *Maryland*, 373 U.S. 83 (1963). *Brady* and the cases applying it hold that the government has a limited duty under the Due Process Clause to disclose exculpatory information to a criminal defendant. But under those decisions, that duty arises only when disclosure is necessary to ensure a fair trial. See Pet. 10-11. Because a criminal defendant who pleads guilty waives a trial, a duty to disclose exculpatory information under *Brady* never arises. *Matthew* v. *Johnson*, 201 F.3d 353, 360 (5th Cir.), cert. denied, 531 U.S. 830 (2000).

Respondent's observation (Br. in Opp. 10) that *Brady* applies to sentencing proceedings does not alter that conclusion. The right to a fair trial embraces not only

contested issues of guilt but also contested issues concerning punishment. It does not, however, embrace a proceeding in which a defendant admits guilt and waives a trial. No decision of this Court has applied *Brady* to a guilty plea proceeding.

Respondent similarly errs in contending (Br. in Opp. 11-12) that a prosecutor's disclosure of exculpatory material is necessary to ensure an intelligent and voluntary plea. This Court's cases make clear that, in order to make an intelligent and voluntary plea, a criminal defendant does not need to know the strength of the government's case. In *Brady* v. *United States*, 397 U.S. 742, 747 (1970), the Court specifically explained that "[w]e find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." Likewise in *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970), the Court held that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," and that "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case." *Id.* at 769.

Respondent contends (Br. in Opp. 15-22) that *Hill* v. *Lockhart*, 474 U.S. 52 (1985), supports the conclusion that the government's disclosure of exculpatory information is necessary to ensure an intelligent and voluntary plea. In *Hill*, the Court held that a defendant can attack a guilty plea as unintelligent and involuntary based on the ineffectiveness of counsel if he can show that counsel's performance was not "within the range of competence demanded of attorneys in criminal cases,"

id. at 56, and that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *id.* at 59. Respondent argues (Br. in Opp. 19-20) that it would be "anomalous" to hold that a guilty plea may be attacked as unintelligent and involuntary if a defendant can show that defense counsel failed to uncover exculpatory evidence that would have caused him to go to trial, but that the plea may not be attacked on that ground if the government failed to disclose the very same evidence.

Respondent's reliance on *Hill* is misplaced. The Sixth Amendment to the Constitution contains a specific command that "[i]n all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence." The Court has explained that the Sixth Amendment guarantees the effective assistance of counsel "because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984). Neither the Sixth Amendment nor any other constitutional provision commands that a defendant shall have a right to effective assistance from the government. That is hardly surprising. If the government had a duty to assist the defense that paralleled defense counsel's duty, it would "displace the adversary system," and "would entirely alter the character and balance of our present systems of criminal justice." *United States* v. *Bagley*, 473 U.S. 667, 675 & n.7 (1985).

Thus, the court of appeals' decision cannot be reconciled with this Court's decisions. Certiorari would be warranted, however, even if this Court's cases did not foreclose the result reached by the Ninth Circuit. At the very least, the Ninth Circuit's decision resolves an

important question of federal law that has not been, but should be, definitively resolved by this Court.[1]

C. The Ninth Circuit's Ruling Goes Beyond Those Of Other Circuits

Respondent contends (Br. in Opp. 11-15) that certiorari is not warranted because the Ninth Circuit's ruling in this case is consistent with that of every other circuit that has resolved the issue. In fact, however, no other circuit has gone as far as the Ninth Circuit in holding that a criminal defendant has a right to obtain material exculpatory information before entering a guilty plea.

For example, the Second Circuit has held that, when the government is *ordered* to turn over *Brady* information before trial, "its failure to do so may be a basis for vacating the guilty plea if the withheld evidence was material," but that court expressly reserved the question whether such a duty would arise in other situations. *United States* v. *Avellino*, 136 F.3d 249, 262 (1998). Respondent errs in implying (Br. in Opp. 22) that the Second Circuit resolved that question in *United States* v. *Coppa*, 267 F.3d 132, 143 (2001). *Coppa* rejected, on the government's petition for a writ of mandamus, a proposed rule that all exculpatory and impeachment evidence must be produced *immediately* on a defendant's request "even if the request is made far in advance of trial." *Id.* at 135, 146.

---

[1] Certiorari is also warranted to decide the question whether, assuming that a criminal defendant has a right to receive exculpatory information before pleading guilty, that right may be waived. In general, even the most basic constitutional protections may be waived, *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995), and there would be no reason to treat a newly created due process right, based on an expansion of *Brady*, to receive exculpatory information before pleading guilty any differently. See Pet. 14-16.

The Sixth Circuit and Eighth Circuits have held that the failure to disclose *Brady* evidence is simply one relevant factor in deciding whether a defendant has entered a voluntary plea. *Campbell* v. *Marshall*, 769 F.2d 314, 322-324 (6th Cir. 1985), cert. denied, 475 U.S. 1048 (1986); *White* v. *United States*, 858 F.2d 416, 422 (8th Cir. 1988), cert denied, 489 U.S. 1029 (1989). And the Tenth Circuit has held that a prosecutor's duty to disclose exculpatory information to a defendant who pleads guilty arises only "under certain limited circumstances." *United States* v. *Wright*, 43 F.3d 491, 496 (1994). None of those courts has adopted the Ninth Circuit's categorical rule that the government has a free-standing obligation to disclose all material exculpatory information before a defendant pleads guilty.[2]

Moreover, in *Matthew* the Fifth Circuit sharply disagreed with the position adopted by the Ninth Circuit, stating that "the failure of a prosecutor to disclose

---

[2] Respondent errs in contending (Br. in Opp. 12 n.6) that the Sixth Circuit adopted the Ninth Circuit's rule in *United States* v. *Ross*, 245 F.3d 577 (2001). In that case, a defendant who was convicted by a jury challenged the conviction on the ground that the government had failed to disclose *Brady* information. The defendant had entered into a sentencing agreement in which he agreed not to appeal or to file post-conviction motions. Without deciding whether the defendant had waived his right to challenge his conviction, the court rejected the defendant's *Brady* challenge on the ground that the defendant had failed to establish that the information that the prosecution did not disclose was material. *Id.* at 583-584. *Ross* therefore did not involve the question presented here. In a footnote relied upon by respondent, the court cited *Campbell* for the proposition that "a state defendant may raise, after a plea of guilty, a claim that prosecutors withh[e]ld exculpatory evidence in violation of *Brady*," but the court did not purport to alter the standards established in *Campbell* for evaluating such a claim. *Id.* at 583 n.1.

exculpatory information to an individual waiving his right to trial is not a constitutional violation," 201 F.3d at 361-362, and that a defendant's awareness of *Brady* material is not an indispensable component of a voluntary and intelligent plea, *id.* at 368-369. While the Fifth Circuit ultimately rejected the defendant's collateral attack on the ground that extending *Brady* to a guilty plea would require the creation of a new constitutional rule in violation of *Teague* v. *Lane*, 489 U.S. 288 (1989), the Fifth Circuit's decision thoroughly exposes the weaknesses in the Ninth Circuit's analysis and adds to the uncertainty concerning the scope of the government's guilty plea obligations.

D. The Ninth Circuit's Ruling Imposes Serious Costs On The Criminal Justice System

Respondent finally contends (Br. in Opp. 31) that the Ninth Circuit's ruling will not adversely affect the criminal justice system because its holding applies only to the limited class of exculpatory information that is "material." That limitation, however, does not prevent the Ninth Circuit's ruling from imposing serious costs on the criminal justice system. First, as Judge Tallman emphasized in his dissent, the Ninth Circuit's ruling interferes with the government's interest in maintaining the confidentiality of its witnesses and informants. Pet. App. 38a. In some cases, premature disclosure of witnesses and informants will disrupt ongoing investigations; in others it could endanger lives. Respondent's assurance (Br. in Opp. 31) that "*Ruiz* does not require the wholesale disclosure of the identities of informers, although occasionally it may" is hardly comforting.

Second, as Judge Tallman noted, in order to comply with the Ninth Circuit's decision, prosecutors would be

required to engage in "the often time-consuming process of determining which witnesses it may call at trial, what potential impeachment information on each witness is in its possession, and whether it must disclose that information to the defendant." Pet. App. 39a. Limiting the information that eventually must be disclosed to that which is "material" does nothing to reduce the enormous burden of that process. Before the government can decide what information is "material," it first must determine who its witnesses are likely to be, and it then must search the files of all members of the prosecution team for information that might impeach those witnesses. As a general matter, the government does not begin that kind of time-intensive trial preparation until it is clear that a case is going to trial.

The Ninth Circuit's ruling therefore transforms the guilty plea process from an expeditious method for resolving criminal charges into a time-consuming task that would require a significant additional commitment of scarce government resources. It also deters the government from accepting guilty plea proposals in certain cases where the requirement to disclose impeachment information would jeopardize the role of undercover officers and informants in ongoing investigations. This Court should grant review to decide whether that fundamental change in the federal criminal justice system should occur.

* * * * *

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

THEODORE B. OLSON
Solicitor General

DECEMBER 2001

(9)

Supreme Court, U.S.
FILED
FEB 19 2002
OFFICE OF THE CLERK

No. 01-595

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: OCT. 9, 2001
CERTIORARI GRANTED: JAN. 4, 2002

29 pp

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(SAN DIEGO)

No. 99-CR-2604-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANGELA RUIZ, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
8/13/99	—	DEFENDANT Angela Ruiz arrested [3:99-m-2065] (avl) [Entry date 08/17/99]
8/16/99	1	COMPLAINT against defendant Angela Ruiz, signed by Magistrate Judge Louisa S. Porter [3:99-m-2065] (avl) [Entry date 08/17/99]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/8/99	6	INDICTMENT by USA. Counts filed against Angela Ruiz (1) count (s) 1, 2. * * * [Entry date 09/13/99]
		* * * * *
10/12/99	10	Dft admits to all allegations, plea entered. * * * [Entry date 10/13/99]
		* * * * *
10/19/99	12	Minutes: Enter Order by Judge Howard B. Turrentine, Angela Ruiz changes plea to guilty as to count(s) 1. * * * [Entry date 10/20/99]
1/10/00	14	Minutes: Enter Order by Judge Howard B. Turrentine: sentencing Angela Ruiz (1) to count(s) 1 - the dft is committed to the custody of the BOP for 18 months, spv release for 3 years, $100 p/a, no fine, dft advised of appeal rights; Terminating defendant Angela Ruiz, Govt's oral motion to dismiss remaining cnt – granted. * * * [Entry date 01/11/00]

DATE	DOCKET NUMBER	PROCEEDINGS
1/12/00	15	JUDGMENT and Commitment issued to U.S. Marshal for Angela Ruiz by Judge Howard B. Turrentine (sld) [Entry date 01/12/00]
1/12/00	16	Notice of Appeal by defendant Angela Ruiz from Dist. Court decision Entered on 1/12/00 [15-1] (llb) [Entry date 01/13/00]
		* * * * *
1/25/00	—	TRANSCRIPT of proceeding held in San Diego, CA on 1/10/00 before the Honorable Howard B. Turrentine (sld) [Entry date 01/25/00]
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50048

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANGELA RUIZ, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
10/12/00	ARGUED AND SUBMITTED TO Robert BOOCHEVER, A. W. TASHIMA, Richard C. TALLMAN [00-50048] (bg)
	* * * * *
3/5/01	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published, Robert BOOCHEVER, author; A. W. TASHIMA, concurring; Richard C. TALLMAN.) FILED AND ENTERED JUDGMENT. [00-50048] (wp)

DATE	PROCEEDINGS
	* * * * *
4/18/01	[4146475] Filed original and 50 copies Appellee USA petition for rehearing with suggestion for rehearing en banc (PANEL AND ALL ACTIVE JUDGES) 17 p. pages, served on 4/17/01 [00-50048] (wp)
4/23/01	Filed order (Robert BOOCHEVER, A.W. TASHIMA, Richard C. TALLMAN,): Defendant-Aplt Angela Ruiz, is requested to file a response to the petition for rehearing and rehearing en banc. The response is limited to 15 pages and shall be filed with 21 days of the date of this order. [00-50048] (wp)
5/14/01	Filed Appellant Angela Ruiz's response to petition for rehearing with suggestion for rehearing en banc. [4146475-1] served on 5/12/01 (PANEL AND ALL ACTIVE JUDGES) [00-50048] (wp)
	* * * * *
6/11/01	Filed order (Robert R. BEEZER, A.W. TASHIMA, Richard C. TALLMAN) Judges Boochever and Tashima have voted to deny the petition for rehearing. Judge Tashima has voted to deny the petition for rehearing en banc and Judge Boochever so recommends. Judge Tallman has voted

DATE	PROCEEDINGS
	to granted the petition for rehearing en banc. The full court has been advised of the petitions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. The petition for rehearing and rehearing en banc are denied. [00-50048] (ca)
	* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 99-CR -2604-T

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANGELA RUIZ, DEFENDANT

INDICTMENT

TITLE 21, U.S.C., SECS. 952 AND 960 - IMPORTATION OF MARIJUANA; TITLE 21, U.S.C., SEC. 841(a)(1) – POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

AUGUST 1999 GRAND JURY

The grand jury charges"

Count 1

On or about August 13, 1999, within the Southern District of California, defendant ANGELA RUIZ did knowingly and intentionally import approximately 30.1 kilograms (approximately 66.3 pounds) of marijuana, a Schedule I Controlled Substance, into the United States from a place outside thereof; in violation of Title 21, United States Code, Section 952 and 960.

Count 2

On or about August 13, 1999, within the Southern District of California, defendant ANGELA RUIZ did intentionally possess, with intent to distribute, approximately 30.1 kilograms (approximately 66.3 pounds) of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Section 841 (a)(1).

DATED: September 8, 1999.

A TRUE BILL:

_____
Foreperson

GREGORY A VEGA
United States Attorney

By: _____
DAVID L. KATZ
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANGELA RUIZ, DEFENDANT

PLEA AGREEMENT

IT IS HEREBY AGREED between the plaintiff, UNITED STATES OF AMERICA, through its counsel, Gregory A. Vega, United States Attorney, and XXXXXX X. XXXXXX, [Special] Assistant United States attorney, and defendant, *, with the advice and consent of *, [Federal Defenders of San Diego, Inc.], counsel for defendant, as follows:

I.

THE PLEA

Defendant agrees to waive indictment and plead guilty to an information charging defendant with:

knowingly and intentionally importing approximately XX.XX kilograms/XX.XX pounds of marijuana, Schedule I Controlled Substance, into the United States from a place outside thereof, on or about *, 2000, within the Southern District of California, in violation of 21 U.S.C. §§ 952 and 960.

II.

NATURE OF THE OFFENSE

A. ELEMENTS EXPLAINED

Defendant understands that the offense to which defendant is pleading guilty has the following elements:

1. Defendant intentionally brought marijuana into the United States; and
2. Defendant knew that it was marijuana or some other prohibited drug.

B. ELEMENTS UNDERSTOOD AND ADMITTED - FACTUAL BASIS

Defendant has fully discussed the facts of this case with defense counsel. Defendant has committed each of the elements of the crime, and admits that there is a factual basis for this guilty plea. The following facts are true and undisputed:

On XXXXXXXXX XX, 2000, defendant entered the United States at the XXXXXX, California Port of Entry, driving a vehicle, which defendant knew concealed marijuana. The weight of the marijuana concealed in the vehicle is approximately XX.XX kilograms/XX.XX pounds.

III.

PENALTIES

Defendant understands that the crime to which defendant is pleading guilty carries the following penalties:

a. a maximum X years in prison;

b. a maximum $XXX,XXX fine;

c. a mandatory special assessment of $100.00 per count; and

d. a term supervised release of at lease X years but no more than X years. Defendant understands that failure to comply with any of the conditions of supervised release may result in revocation of supervised release, requiring defendant to serve in prison all or part of the term of supervised release.

IV.

DEFENDANT'S WAIVER OF TRIAL RIGHTS

Defendant understands that this guilty plea waives the right to:

A. continue to plead not guilty and require the Government to prove the elements of the crime beyond a reasonable doubt:

B. a speedy and public trial by jury;

C. the assistance of counsel at all stages of trial;

D. confront and cross-examine adverse witnesses;

E. present evidence and to have witnesses testify on behalf of defendant; and

F. not testify or have any adverse inferences drawn from the failure to testify.

V.

WAIVER OF RIGHT TO BE PROVIDED WITH IMPEACHMENT AND AFFIRMATIVE DEFENSE INFORMATION

The Government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The Government understands it has a continuing duty to provide such information establishing the factual innocence of the defendant.

The defendant understands that if this case proceeded to trial, the Government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the Government would be required to provide information in its possession that supports such a defense. In return for the Government's promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information.

VI.

DEFENDANT'S REPRESENTATION THAT GUILTY PLEA IS KNOWING AND VOLUNTARY

Defendant represents that:

A. Defendant has had a full opportunity to discuss all the facts and circumstances of this case with

defense counsel and has a clear understanding of the charges and the consequences of this plea;

B. No one has made any promises or offered any rewards in return for this guilty plea, other than those contained in this agreement;

C. No one has threatened defendant or defendant's family to induce this guilty plea; and

D. Defendant is pleading guilty because in truth and in fact defendant is guilty and for no other reason.

VII.

AGREEMENT LIMITED TO U.S. ATTORNEY'S OFFICE SOUTHERN DISTRICT OF CALIFORNIA

This plea agreement is limited to the United States Attorney's Office for the Southern District of California, and cannot bind any other federal, state or local prosecuting, administrative, or regulatory authorities, although the Government will bring this plea agreement to the attention of other authorities if requested by the defendant.

VIII.

SENTENCING GUIDELINES

The defendant understands the sentence will be governed by the United States Sentencing Commission, *Guidelines Manual* effective November 1998 (the "Guidelines"). Defendant has discussed the Guidelines with defense counsel, and understands that the sentence cannot be determined until a presentence report

has been prepared by the U.S. Probation Office and defense counsel and the Government have had an opportunity to review and challenge the presentence report. Defendant understands that, under some circumstances, the Court may "depart" from the Guidelines and impose a sentences more severe or less severe than the Guidelines, up to the maximum in the statute of conviction

IX.

SENTENCE IS WITHIN SOLE DISCRETION OF THE JUDGE

This plea agreement is made pursuant to Federal Rule of Criminal Procedure 11(e) (1) (B). Defendant understands that the sentence is within the sole discretion of the sentencing judge. The Government has not made and will not make any representation as to what sentence defendant will receive. Defendant understands that the sentencing judge may impose the maximum sentence provided by statute, and is also aware that any estimate of the probable sentence by defense counsel is a prediction, not a promise, and is *not binding on the Court.* Likewise, the recommendation made by the Government is not binding on the Court, and it is uncertain at this time what defendant's sentence will be.

Defendant also has been advised and understands that if the sentencing judge does not follow any of the parties' sentencing recommendations, defendant nevertheless has no right to withdraw the plea.

X.

PARTIES SENTENCING RECOMMENDATIONS

A. BASE OFFENSE LEVEL AND GOVERNMENT'S RECOMMENDATIONS

The parties will jointly recommend the following Base Offense Level under the Sentencing Guidelines:

1. Base Offense Level [§2D1.1] XX
   * (Reflecting a reduction to approximate Net weight of XX.XX kilograms)

In addition, the Government will make the following sentencing recommendations:

2. Minor Role [§ 3B1.2(b)] -X

3. Acceptance of Responsibility [§ 3E1.1] -X

4. Departure for Fast Track [§ 5K2.0] -2
   (See paragraph H below)

   Resulting Offense Level XX

B. ACCEPTANCE OF RESPONSIBILITY

Notwithstanding paragraph A.3 above, the Government will *not* recommend any adjustment for *Acceptance of Responsibility* if defendant:

1. Fails to admit a complete factual basis for the plea at the time it is entered, or

2. Denies involvement in the offense, gives conflicting statements about that involvement, or is untruthful with the Court or probation officer, or

3. Fails to appear in court, or
4. Engage in additional criminal conduct, or
5. Attempts to withdraw the plea.

C. ADJUSTMENTS

Defendant hereby reserves the right to request, any additional downward adjustments. The Government will oppose any downward adjustment not set forth in Section X, paragraph A above.

D. NO AGREEMENT AS TO CRIMINAL HISTORY CATEGORY

There is no agreement as to defendant's Criminal History Category.

E. DEPARTURES

Defendant hereby reserves the right to request any additional downward departure, including any criminal history departures under USSG § 4A1.3. The Government will oppose any downward departure not set forth in Section X, paragraph A above.

F. "RELEVANT CONDUCT" INFORMATION

Defendant agrees that the facts in the "factual basis" paragraph of this agreement are true, and may be considered as "relevant conduct" under USSG § 1B1.3.

G. GOVERNMENT'S RECOMMENDATION REGARDING CUSTODY

The Government will recommend that defendant be sentenced to the low end of the guideline range found by the Court. However, if the Court adopts an offense

level or downward adjustment or departure below the Government's recommendations in this agreement, the Government will recommend a sentence as near as possible to what the sentence would have been if the Government's recommendation had been followed.

H. STIPULATED REMOVAL

Either before or immediately following sentencing, defendant agrees to appear before an Immigration Judge and stipulate to the entry of an order of removal. Prior to sentencing the defendants may be required to execute a "Stipulated Request for removal Order and Waiver of Hearing." Defendant understands that defendant will not be removed until defendant has served any criminal sentence imposed in this or any other case. Defendant further waives any right to appeal, reopen or challenge the removal order.

I. SPECIAL ASSESSMENT

The parties will jointly recommend that defendant pay a special assessment in the amount of $100.00 to be paid forthwith at time of sentencing. The parties do not recommend imposition of a fine or restitution order due to the defendant's limited financial prospects and because of the prohibitive cost of collection..

XI.

DEFENDANT WAIVES APPEAL AND COLLATERAL ATTACK

In exchange for the Government's concessions in this plea agreement, defendant waives, to the full extent of the law, any right to appeal or to collaterally attack the conviction and sentence, including any restitution

order, unless the Court imposes a sentence in excess of the high end of the guideline range based on an adjusted offense level of XX. If the custodial sentence exceeds that which corresponds to the defendant's criminal history at the high end of offense level XX, the defendant may appeal, but the Government will be free to support on appeal the sentence actually imposed. If defendant believes the Government's recommendation is not in accord with this agreement, defendant will object at the time of sentencing; otherwise the objection will be deemed waived.

XII.

CRIMES AFTER ARREST OR BREACH OF THE AGREEMENT WILL PERMIT THE GOVERNMENT TO RECOMMEND A HIGHER SENTENCE OR SET ASIDE THE PLEA

This agreement is based on the understanding that defendant has committed no criminal conduct since defendant's arrest on the present charges, and that defendant will commit no additional criminal conduct before sentencing. If the defendant has engaged in or engages in additional criminal conduct during this period, or breaches any of the terms of this agreement, the Government will not be bound by the recommendations in this agreement, and may recommend any lawful sentence. In addition, at its option, the Government may move to set aside the plea.

XIII.

ENTIRE AGREEMENT

This plea agreement embodies the entire agreement between the parties and supersedes any other agreement, written or oral.

XIV.

MODIFICATION OF AGREEMENT MUST BE IN WRITING

No modification of this plea agreement shall be effective unless in writing signed by all parties.

XV.

DEFENDANT AND COUNSEL FULLY UNDERSTAND AGREEMENT

By signing the agreement, defendant certifies that defendant has read it (or that it has been read to defendant in defendant's native language). Defendant has discussed the terms of this agreement with defense counsel and fully understands its meaning and effect.

XVI.

DEFENDANT SATISFIED WITH COUNSEL

Defendant has consulted with counsel and is satisfied with counsel's representation.

GREGORY A. VEGA
United States Attorney

DATED*

*
[Special] Assistant
U.S. Attorney

DATED

XXXXX XXXXX
Defense Counsel for
XXXXX XXXXX

IN ADDITION TO THE FOREGOING PROVISIONS TO WHICH I AGREE, I SWEAR UNDER PENALTY OF PERJURY THAT THE FACTS IN THE "FACTUAL BASIS" PARAGRAPH ABOVE ARE TRUE.

DATE

XXXXX XXXXXX
Defendant

I, am a citizen of the United States over the age of eighteen years and a resident of San Diego, County, California; my business address is Office of the U.S. Attorney, 880 Front Street, San Diego, California 92101-8893.

On this date, I served the within Appellee United States' Petition for Rehearing En banc in Court of Appeal No. 00-50048, by placing true copies thereof in a sealed envelope sent by Federal Express address as follows:

Clerk of the Court
U.S. Court of Appeals
of the Ninth Circuit
San Francisco, CA 94103-1526

and I deposited in the United States mail at San Diego, California, in an envelope bearing the requisite postage, a copy to:

Guadalupe Valencia
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5008

the last known address.

I declare under the penalty of perjury that the following is true and correct.

Executed on April 17, 2001, in San Diego, California.

/s/ STACY MULLINS
STACY MULLINS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 99CR2604-T

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANGELA RUIZ, DEFENDANT

TRANSCRIPT OF PROCEEDINGS
HELD IN SAN DIEGO, CALIFORNIA
OCTOBER 19, 1999

BEFORE THE
HONORABLE HOWARD B. TURRENTINE

SAN DIEGO, CALIFORNIA TUESDAY, OCTOBER 19, 1999 9:00 A.M.

- -0O0- -

(Call to order of the Court.)

THE CLERK: Calling Item Number 2 on calendar, Case Number 99CR-2604, U.S.A. versus Angela Ruiz, on for motion hearing.

MR. WINROW: Good morning, your Honor. Scott Winrow for the United States.

MR. BRITT: Good morning, your Honor. Troy Britt with Federal Defenders on behalf of Ms. Ruiz,

who is in custody and not yet present. Your Honor, Ms. Ruiz is now present.

Your Honor, at this time, Ms. Ruiz would like to withdraw her not guilty plea and enter a guilty plea to count one on the indictment.

THE CLERK: Angela Ruiz, do you now desire to with draw your former plea of not guilty to count one of the indictment, charging you with importation of marijuana, and to plead guilty?

THE DEFENDANT: Yes.

THE CLERK: How do you now plead to count one of the indictment, guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: Counsel, do you waive reading of the count?

MR. BRITT: Yes.

THE CLERK: Please raise your right hand.

ANGELA RUIZ, DEFENDANT'S WITNESS, SWORN

THE COURT: Is there a plea bargain?

MS. BRITT: There is not, your Honor.

THE COURT: Very well.

Ms. Ruiz, you've just been placed under oath, that is, sworn to tell the truth. If you make any false statements during these proceedings, these statements

may later be used against you in a possible prosecution for perjury, that is, giving false testimony under oath.

You have a right to persist in your pleas of not guilty, and if the Court accepts your plea this morning, you've waived all right to a trial and an appeal from any adverse judgment.

Do you understand what I've just said to you?

THE DEFENDANT: Yes.

THE COURT: You have certain constitutional rights as they pertain to a trial in this matter, and I'm sure your counsel has discussed them with you, but let me re-advise you that you have a right to a speedy and public trial, a right to be tried by a jury, a privilege against self-incrimination, a right to be confronted by and cross-examine all witnesses who accuse you in this matter, and a right to use the Court's processes to subpoena witnesses to testify in your own behalf.

Do you understand these rights?

THE DEFENDANT: Yes, I do.

THE COURT: Do you wish to waive them and enter a plea of guilty?

THE DEFENDANT: Yes.

THE COURT: Do You understand that you're charged as follows, that on or about August the 13th, 1999, within the Southern District of California, that you knowingly and intentionally imported approximately 30 kilograms of marijuana, a Schedule I controlled substance?

That's the charge. Do you understand the charge?

THE DEFENDANT: I do.

THE COURT: The maximum penalty for this is five years in prison, a $250,00 fine, a maximum of three years' supervised release, and a penalty assessment of $100. That's the maximum penalty.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: And if you were to go to trial in this matter, the burden would be on the Government to prove beyond a reasonable doubt that you knowingly brought marijuana into this country from a place outside thereof, in this case 31 kilos.

Do you understand the charge?

THE DEFENDANT: I do.

THE COURT: Are you satisfied with the services of your attorney?

THE DEFENDANT: Yes, I am.

THE COURT: And you've discussed the case with him in its entirety?

THE DEFENDANT: Yes

THE COURT: You're satisfied, as I say, with his services?

THE DEFENDANT: Yes, I am.

THE COURT: Accept the plea, Mr. Clerk.

THE CLERK: Now that you've been advised of your rights, the charge against you, and a possible sentence, how do you not plead to count one of the indictment, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: I didn't hear you. Speak into the microphone.

THE DEFENDANT: Guilty.

THE COURT: Tell us in your own words what you did, Ms. Ruiz.

MR. BRITT: Your Honor, if you don't mind—

THE COURT: You may assist her.

MR. BRITT: Thank you, your Honor. On August 13th, Ms. Ruiz drove a vehicle from Mexico into the United States at the Tacate port of entry, and that vehicle contained approximately 30.1 kilograms of marijuana, which she knew was illegal.

THE COURT: Is that a fair statement of what took place, that is, you were driving the car as you entered the border, and you knew there was marijuana in it?

THE DEFENDANT: Yes, I did.

THE COURT: Give us a sentencing date.

THE CLERK: January the 10th at 9:00 a.m.

MR. BRITT: Thank you, your Honor.

THE COURT: Very well.

MR. WINROW: Thank you, your Honor.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ LORAINE CALDWELL [5/3/00]
Transcriber Date

FEDERALLY CERTIFIED TRANSCRIPT AUTHENTICATED BY:

/s/ L.L. FRANCISCO
L. L. FRANCISCO, President
Echo Reporting, Inc.

Supreme Court, U.S.
FILED
FEB 19 2002

No. 01-595

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
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QUESTIONS PRESENTED

1. Whether before pleading guilty, a criminal defendant has a constitutional right to obtain material exculpatory information, including impeachment information, from the prosecution.

2. If so, whether that right may be waived through a plea agreement.

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In the Supreme Court of the United States

No. 01-595

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 241 F.3d 1157.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2001. A petition for rehearing was denied on June 11, 2001 (Pet. App. 40a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, RULES, AND STATUTE INVOLVED

The Due Process Clause of the Fifth Amendment provides in pertinent part that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." The relevant portions of Rules 11 and 16 of the Federal Rules of Criminal Procedure and of the Jencks Act, 18 U.S.C. 3500, are set forth in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

Following a plea of guilty, respondent was convicted in the United States District Court for the Southern District of California on one count of importing marijuana, in violation of 21 U.S.C. 952 and 960. J.A. 7. Respondent was sentenced to 18 months' imprisonment, to be followed by three years of supervised release. J.A. 2. The court of appeals vacated respondent's sentence and remanded for resentencing. Pet. App. 21a.

1. On August 13, 1999, respondent entered the United States from Mexico through the port of entry at Tecate, California. J.A. 25. A search of respondent's car uncovered approximately 30.1 kilograms of marijuana concealed within it. *Ibid.* Respondent was arrested and transported to the Metropolitan Correctional Center. Pet. App. 1a.

The United States Attorney for the Southern District of California offered respondent an opportunity to enter into a "fast-track" plea agreement. Pet. App. 1a-2a. Under the Southern District of California's standard fast-track agreement, a defendant agrees to waive indictment, plead guilty to an information, and waive appellate rights. J.A. 9-10, 17-18. In addition, the standard fast-track agreement contains a provision in which the government represents that it has provided the defendant with any information in its possession that establishes the defendant's factual innocence, and the defendant waives the right to receive any information that would impeach government witnesses or support an affirmative defense. J.A. 12; Pet. App. 45a-46a. The waiver provision of the agreement specifically

states that:

> The Government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The Government understands it has a continuing duty to provide such information establishing the factual innocence of the defendant.
>
> The defendant understands that if this case proceeded to trial, the Government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the Government would be required to provide information in its possession that supports such a defense. In return for the Government's promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information.

Ibid. In return for the defendant's commitments, the government agrees to recommend a two-level downward departure from the offense level specified by the Sentencing Guidelines. *Ibid.*

Respondent declined the U.S. Attorney's offer to enter into a plea agreement. Pet. App. 2a.

2. A federal grand jury subsequently returned a two-count indictment charging respondent with importing marijuana, in violation of 21 U.S.C. 952 and 960, and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). J.A. 7-8. Respondent pleaded guilty to the count charging her with importing marijuana. J.A. 25. At the hearing on her guilty plea,

respondent stated that she understood the charge to which she was pleading guilty and the maximum penalty she faced. J.A. 24. She further stated that she was satisfied with her attorney's services. J.A. 25. After her attorney described her criminal conduct, respondent admitted that she knowingly drove a car containing approximately 30.1 kilograms of marijuana across the border. J.A. 25-26.

The Presentence Investigation Report determined that respondent's total offense level was 13 and that her criminal history category was III, yielding a Guidelines sentencing range of 18-24 months' imprisonment. See Pet. App. 43a. Respondent sought a "fast-track" downward departure, asserting that she had done everything to qualify for such a departure except waive the right to receive information that would impeach government witnesses and support an affirmative defense. *Id.* at 41a-43a. She further argued that she had a constitutional right to receive such information under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972), and that the government had acted unconstitutionally in attempting to secure a waiver of that right. Pet. App. 42a-43a. The government opposed a fast-track departure, on the ground that it had not received the benefits that accompany fast-track agreements. *Id.* at 42a. The district court refused to grant a downward departure and sentenced respondent to 18 months' imprisonment. *Id.* at 43a-44a.

3. A divided panel of the Ninth Circuit reversed and remanded for resentencing. Pet. App. 1a-39a. As relevant here, the court held that a criminal defendant has a constitutional right to obtain material exculpatory information before pleading guilty and that a defendant

may not validly waive that right through a plea agreement. *Id.* at 8a-16a.

The court of appeals first reaffirmed its holding in *Sanchez* v. *United States*, 50 F.3d 1448, 1453 (1995), that "guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material [exculpatory] information withheld by the prosecution." Pet. App. 9a. The court also reaffirmed *Sanchez*'s rationale—that "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." *Id.* at 9a-10a.

The court of appeals next concluded that "[t]he rationale of *Sanchez* applies with equal force to plea agreements." Pet. App. 10a. The court reasoned that "[t]he disclosure of *Brady* evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a guilty plea." *Ibid.* The court therefore concluded that "plea agreements, and any waiver of *Brady* rights contained therein, 'cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution.'" *Ibid.* The court rejected the government's argument that a waiver is valid if limited to impeachment material bearing on the credibility of government witnesses. *Id.* at 13a-15a. Noting that this Court had rejected any distinction between impeachment material and other exculpatory material under *Brady*, *id.* at 14a-15a, the court held that information favorable to the defense must be disclosed whenever it would create "a reasonable probability that but for the failure to disclose the *Brady* material the defendant would have refused to plead and would have gone to trial." *Id.* at 15a.

Based on its holding that a waiver of *Brady* rights is invalid, the court of appeals further held that "it is unconstitutional for prosecutors to withhold a departure recommendation based on a defendant's refusal to accept such a waiver." Pet. App. 18a. The court also concluded that respondent had made a sufficient showing to warrant an evidentiary hearing on whether "the Government declined to recommend a 'fast track' departure because [respondent] refused to waive her *Brady* rights." *Id.* at 19a. The court remanded with directions to the district court to conduct such a hearing, and to determine in its discretion whether to remedy any violation it found. *Id.* at 20a-21a.

Judge Tallman dissented. Pet. App. 25a-39a. He concluded that the majority's rule "forces the government to turn over information to a defendant immediately upon beginning plea bargain negotiations, when that information will generally be of little use to the defendant unless she goes to trial." *Id.* at 38a. Judge Tallman also concluded that the majority's rule interferes with the government's substantial interest in "maintaining the confidentiality of government witnesses and protecting ongoing investigations." *Ibid.* Judge Tallman emphasized that the majority's rule prevents the expeditious resolution of drug courier cases because it requires prosecutors to engage in "the often time-consuming process of determining which witnesses it may call at trial, what potential impeachment information on each witness is in its possession, and whether it must disclose that information to the defendant." *Id.* at 39a.

SUMMARY OF ARGUMENT

I. A criminal defendant does not have a constitutional right to obtain material exculpatory information

from the government before pleading guilty. The rule announced in *Brady* v. *Maryland*, 373 U.S. 83 (1963), establishes that a prosecutor has a duty to disclose material exculpatory information to a defendant in order to protect the fairness of a verdict at trial, and to guard against the risk that an innocent person might be found guilty because the government withheld evidence. Those purposes are not implicated when a defendant pleads guilty and waives his right to a trial. Except in the most unusual circumstances, a defendant who is assisted by competent counsel knows whether he has committed the charged offense. If such a defendant pleads guilty, there is no reason to question the reliability of the plea. As this Court has explained, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis deleted).

Nor must a defendant have access to the prosecution's files in order to enter a voluntary and intelligent plea. When a defendant pleads guilty, he is not admitting that the government's evidence establishes his guilt beyond a reasonable doubt. He admits that "he actually committed the crimes," and that "he is pleading guilty *because he is guilty*" (emphasis added). *United States* v. *Hyde*, 520 U.S. 670, 676 (1997). A defendant does not need to know the strength of the government's case in order to make those admissions intelligently and voluntarily.

In *Brady* v. *United States*, 397 U.S. 742, 757 (1970), the Court specifically explained that there is "no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open

court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." Similarly, in *McMann* v. *Richardson*, 397 U.S. 759, 769 (1970), the Court emphasized that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," and that "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case."

Requiring the prosecution to provide material exculpatory information to a defendant pleading guilty would impose serious costs on the criminal justice system. It would endanger prospective government witnesses and the conduct of ongoing investigations; transform *Brady* v. *Maryland* from a fair trial right into a trial preparation right; hamper the expeditious resolution of criminal cases through guilty pleas; intrude on the strong interest in the finality of criminal convictions; and deter the government from offering plea bargains that would benefit both the defendant and the government. The existence of those serious costs to the administration of justice further undermines the claimed due process right at issue here.

II. Even if *Brady* v. *Maryland*'s due process rule were extended to the guilty plea stage of a criminal proceeding, a defendant pleading guilty could validly waive the right to obtain material exculpatory information in a plea agreement. This Court's decisions establish that a criminal defendant may waive many of the most fundamental constitutional protections, including the privilege against compulsory self-incrimination, the

right to a jury trial, the right to confront one's accusers, and the right to counsel. *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). If there were a due process right to obtain material exculpatory information before pleading guilty, that right should be equally waivable. If a defendant assisted by competent counsel decides to plead guilty and is willing to waive his right to obtain whatever material exculpatory information there happens to be in exchange for the possibility of a reduced sentence or other considerations, no sound constitutional basis exists to prevent him from doing so.

ARGUMENT

RESPONDENT'S RIGHTS WERE NOT VIOLATED BY THE GOVERNMENT'S REFUSAL TO RECOMMEND A DOWNWARD DEPARTURE AFTER HER REJECTION OF THE PLEA AGREEMENT

The court of appeals held that respondent had a constitutional claim that the government may have impermissibly withheld a recommendation for a downward departure at sentencing because of respondent's refusal "to waive her *Brady* rights" in a proposed plea agreement. Pet. App. 21a. That holding is incorrect. The court of appeals recognized that "to prevail on her downward departure claim, [respondent] must show that the *Brady* waiver contained in the rejected plea agreement is unconstitutional." *Id.* at 7a. No such showing can be made. Respondent had no right to *Brady* material in the first place before pleading guilty. In any event, any such right could validly be waived.

I. A CRIMINAL DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO OBTAIN MATERIAL EXCULPATORY INFORMATION FROM THE PROSECUTION BEFORE PLEADING GUILTY

A. A Defendant Does Not Have A Constitutional Right Under *Brady* v. *Maryland* To Obtain Material Exculpatory Information From The Prosecution Before Pleading Guilty

The Ninth Circuit's holding that a criminal defendant has a constitutional right to obtain material exculpatory information from the prosecution before pleading guilty is unsupported by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the decisions applying it. Under those decisions, a prosecutor's duty to disclose exculpatory information arises only where disclosure is necessary to ensure a fair trial on the issues of guilt or punishment. *Brady* does not require the prosecution to disclose information in its files in order to help a criminal defendant make a strategic decision about whether to plead guilty.

In *Brady*, this Court granted a criminal defendant a new sentencing hearing because the prosecutor had withheld evidence of a co-defendant's confession. The Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The principle supporting that holding, the Court explained, is "avoidance of an unfair trial to the accused." *Ibid.*

In *Giglio* v. *United States*, 405 U.S. 150 (1972), the Court extended *Brady* to impeachment evidence, holding that the prosecution violated due process when it

failed to disclose that it had promised its key witness that he would not be prosecuted if he testified at the defendant's trial. The Court reasoned that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." *Id.* at 154.

In subsequent cases, the Court has consistently limited *Brady* to the nondisclosure of exculpatory information that results in the denial of a fair trial by undermining confidence in the reliability of the jury's finding of guilt (or of the resulting sentence). In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court emphasized as "a critical point" that "the prosecutor will not have violated his constitutional duty of disclosure [under *Brady*] unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* at 108. The Court further explained that, because "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt," a prosecutor's failure to disclose exculpatory evidence violates the Constitution only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* at 112. The Court rejected as inconsistent with *Brady* a standard that would instead "focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial." *Id.* at 112 n.20.

Similarly, in *United States* v. *Bagley*, 473 U.S. 667, 675 (1985), the Court explained that the purpose of the *Brady* rule "is not to displace the adversary system," but to "ensure that a miscarriage of justice does not occur." For that reason, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Ibid.* (footnote omitted). Any broader right, the Court

observed, "would entirely alter the character and balance of our present systems of criminal justice." *Id.* at 675 n.7. The Court reiterated that "[c]onsistent with our overriding concern with the justice of the finding of guilt, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 678 (citation and internal quotation marks omitted).

More recently, in *Kyles* v. *Whitley*, 514 U.S. 419, 436-437 (1995), the Court explained that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." A constitutional violation occurs only "when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* at 434. And in *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999), the Court observed that, while the phrase "*Brady* violation" is sometimes used loosely to refer to the breach of a broad obligation to disclose exculpatory evidence, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."

The purpose of the Court's *Brady* decisions is therefore to protect the fairness of the trial and to guard against the risk that an innocent person might be found guilty because the government withheld evidence. That purpose is not implicated when a defendant enters a plea in open court, thereby "admitting guilt of a substantive crime." *United States* v. *Broce*, 488 U.S. 563, 570 (1989). As the Fifth Circuit has explained, "*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads

guilty." *Orman* v. *Cain*, 228 F.3d 616, 617 (5th Cir. 2000) (per curiam); see also *Matthew* v. *Johnson*, 201 F.3d 353, 360, 361-362 (5th Cir.), cert. denied, 531 U.S. 830 (2000).

When a defendant pleads guilty, there is no serious risk that an innocent person will be convicted because the prosecution did not disclose exculpatory evidence. Barring unusual circumstances, a defendant who has the assistance of competent counsel will know whether he is guilty of the charged offense. Once such a defendant solemnly swears in open court that he has committed the offense, there is no reason to question the accuracy of the resulting entry of a finding of guilt. As this Court has explained, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis deleted); see also *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are * * * unlikely to be driven to false self-condemnation.").

Neither *Brady* nor its underlying rationale supports the creation of a new constitutional rule that would require the prosecution to disclose to every criminal defendant contemplating a plea of guilty all material exculpatory information in the prosecution's possession. Disclosure of such material at the guilty plea stage is

not necessary to protect a defendant's right to a fair trial or to ensure the reliability of a finding of guilt.[1]

B. A Defendant May Enter An Intelligent And Voluntary Plea Without Receiving Material Exculpatory Information From The Prosecution

The Ninth Circuit made no attempt to justify its disclosure rule by reference to *Brady* v. *Maryland* or its underlying rationale. Instead, it attempted to link its holding to a separate constitutional principle—that the Due Process Clause requires that a defendant's decision to plead guilty be intelligent and voluntary. The court reasoned that "guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material [exculpatory] information withheld by the prosecution." Pet. App. 9a. The court did not suggest that knowledge of material exculpatory information is

[1] In rare cases, a defendant may be unable to determine whether he is guilty of the charged offense because a fact that is crucial to guilt is outside his knowledge (*i.e.*, the insurance element in a federal bank robbery case) and the defendant, even with the assistance of competent counsel and discovery under Federal Rule of Criminal Procedure 16, cannot discover it through reasonable investigation. Such a defendant, of course, is free to go to trial to compel the government to prove its case. Cf. *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977) ("[T]here is no constitutional right to plea bargain * * * . It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty."). Alternatively, the defendant may tender a plea in order to obtain any advantages flowing from that course of action. Cf. *North Carolina* v. *Alford*, 400 U.S. 25 (1970) (discussed at note 2, *infra*). The existence of those rare cases thus cannot justify a constitutional rule requiring disclosure of material exculpatory information to *all* defendants contemplating a guilty plea; normally, a defendant can readily determine his guilt. In any event, this is not one of those rare cases: respondent could readily determine from her own knowledge that she was guilty of the charged offense of importing marijuana.

necessary for a defendant to know whether he has committed the charged offense. Instead, the court viewed receipt of exculpatory information as a component of an intelligent and voluntary plea only because such information could assist a defendant in making a strategic decision whether to plead guilty or go to trial. The court explained the rationale for its rule as follows: "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." Pet. App. 9a-10a. That test led the court to define materiality by reference to whether the information is reasonably likely to lead a defendant to reject a plea and go to trial. *Id.* at 15a.

But knowledge of the government's evidence (or its weaknesses) has never been a prerequisite to a voluntary and intelligent plea. The inquiry into whether a plea is voluntary and intelligent turns on whether the defendant is competent, acts without coercion, and is aware of the charges and the direct consequences of the plea. When the defendant has not waived the right to counsel, the intelligence of the plea also turns on whether the defendant received effective assistance of counsel. Nothing more is required. Thus, even if the receipt of information from the government might improve the defendant's calculations of the odds of acquittal at trial, it does not mean that a guilty plea entered without such information is involuntary or unintelligent.

1. When a defendant admits that he is guilty in open court, he does not admit that the government will be able to prove his guilt to a jury beyond a reasonable doubt. He admits that "he actually committed the crimes," and that "he is pleading guilty *because he is guilty*" (emphasis added). *United States* v. *Hyde*, 520 U.S. 670, 677 (1997). A defendant does not need to

know of potential weaknesses in the government's case in order to make those admissions voluntarily and intelligently.[2]

In *Brady* v. *United States*, 397 U.S. 742 (1970), the Court upheld a guilty plea against the claim that, but for an unconstitutional death penalty scheme under which a defendant was exposed to the death penalty only if a jury so recommended, the defendant would not have pleaded guilty. *Id.* at 745-746, 747; see *United States* v. *Jackson*, 390 U.S. 570 (1968). Even assuming that the penalty provision was a "cause" of the plea, 397 U.S. at 750, the Court upheld the plea under the traditional test that a guilty plea is valid if it is "both 'voluntary' and 'intelligent.'" *Id.* at 747. The Court held that a plea is voluntary if it is not "induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or

[2] Normally, a defendant's plea entails an acknowledgment of factual guilt whether or not the defendant explicitly admits committing the charged acts. *North Carolina* v. *Alford*, 400 U.S. 25, 32 (1970) (a guilty plea "subsumes" such an admission "even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment"). In an unusual case, a defendant may enter a plea of guilty while maintaining his innocence, as occurred in *Alford*. But *Alford* upheld the trial court's acceptance of such a plea because the "record before the judge contain[ed] strong evidence of actual guilt." *Id.* at 37; *ibid.* (noting "overwhelming evidence" of guilt); *id.* at 38 (noting the "strong factual basis for the plea demonstrated by the State"). *Alford* thus protected against the plea-based conviction of an actually innocent defendant by requiring a strong showing of factual guilt. There is no general constitutional requirement of such a showing as a prerequisite to a plea, because the plea itself represents an admission that the defendant committed the acts charged in the indictment. Cf. Fed. R. Crim. P. 11(f).

unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (*e.g.* bribes)." *Id.* at 755 (internal quotation marks omitted). The Court held that a plea is intelligent when a defendant is "advised by competent counsel," is "aware of the nature of the charge against him" and the "likely consequences" of the plea, and is not "incompetent or otherwise not in control of his mental faculties." *Id.* at 776; *id.* at 748; *id.* at 756. The Court did not include awareness of exculpatory information possessed by the prosecution as an element of a voluntary and intelligent plea.

While the Court recognized in *Brady* v. *United States* that a defendant's entry of a guilty plea often is influenced by the defendant's view of the strength of the prosecution's case, 397 U.S. at 756, the Court went on to *reject* the contention that a defendant must be able to assess accurately the strength of the prosecution's case in order to make a voluntary and intelligent plea. The Court stated that "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Id.* at 757. In particular, the Court explained, "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case." *Ibid.* "We find no requirement in the Constitution," the Court stated, "that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." *Ibid.*

The facts of *Brady* underscore that accurate information about weaknesses in "the prosecution's case" is not a prerequisite to an intelligent plea. 397 U.S. at 757. The defendant in *Brady* pleaded guilty believing that he would face the death penalty if he went to trial, but this Court later invalidated the applicable death penalty provision in *United States* v. *Jackson*, *supra*. 397 U.S. at 756. Even though the defendant had an incorrect understanding of his penalty exposure when he decided to plead guilty, this Court found that his plea was still an "intelligent" one under the constitutional test. *Id.* at 756-757.

Likewise, in *McMann* v. *Richardson*, 397 U.S. 759, 769-770 (1970), the Court upheld the validity of a plea against a claim that it was induced by a defendant's mistaken belief that a confession he made could have been introduced into evidence against him. The Court explained that "a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." *Id.* at 770. Instead, "[w]hether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends * * * on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 770-771. The Court emphasized that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," and that "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case." *Id.* at 769.

In *Bousley* v. *United States*, 523 U.S. 614, 617 (1998), the Court reaffirmed the principles established in

Brady v. *United States* and *McMann*. In that case, the Court held that a guilty plea is not intelligent if a defendant is incorrectly informed about the essential nature of the charges against him. *Id.* at 619. The Court specifically distinguished *Brady* v. *United States* and *McMann*, on the ground that the defendants in those cases had been correctly informed about the nature of the charges against them, and had attacked their pleas solely on the ground that they had "misjudged the strength of the Government's case or the penalties to which they were subject." *Ibid.*

Other decisions of this Court establish that guilty pleas may be intelligent and voluntary even when the defendant lacks knowledge at the time of the plea that he might have a valid defense to the charges against him. In *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), the Court held that a defendant who received effective assistance from counsel could not attack his guilty plea on the ground that he was unaware at the time of the plea that his grand jury had been unconstitutionally selected. Similarly in *United States* v. *Broce*, 488 U.S. 563, 573 (1989), the Court held that because "conscious waiver" is not required "with respect to each potential defense relinquished by a plea of guilty," a defendant who received effective assistance from counsel could not challenge his guilty plea on the ground that he was unaware when he pleaded guilty that he might have a valid double jeopardy defense.

Thus, under this Court's cases, a plea is intelligent and voluntary as long as the defendant (1) has been advised by competent counsel, (2) is aware of the essential nature of the charge and likely consequences of the plea, (3) is in control of his mental faculties, and (4) is not induced to plead guilty by threats, misrepresentation, or improper promises. *Brady*, 397 U.S. at 749-757;

McMann, 397 U.S. at 770. A defendant does not need to know the strengths or weaknesses of the prosecution's case or how he might attack it in order to make a voluntary and intelligent plea.

2. The criminal justice system has sufficient protections in place to prevent the entry of constitutionally invalid pleas without a rule requiring the government to disclose exculpatory evidence. In order to accept a guilty plea, a trial court must make an adequate record that the plea is made voluntarily and intelligently. *Boykin* v. *Alabama*, 395 U.S. 238, 244 (1969). The defendant's right to the effective assistance of counsel in felony cases stands as a further central protection against unintelligent pleas.

In the federal system, Federal Rule of Criminal Procedure 11 establishes additional procedures to ensure that a guilty plea is intelligent and voluntary. See *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969). Rule 11 requires a district court to inform the defendant, and determine that the defendant understands, *inter alia*, (1) the nature of the charge and the minimum and maximum penalties he faces, (2) his right to the assistance of counsel, (3) his right to be tried by a jury, (4) his right at that trial to confront and cross-examine witnesses, and (5) his right against compelled self-incrimination. Fed. R. Crim. P. 11(c). Rule 11 also requires the court to address the defendant personally in open court and to determine that the plea is not the result of force or threats, or of promises other than those contained in a plea agreement. Fed. R. Crim. P. 11(d). Finally, Rule 11 requires the court to find that there is a factual basis for the plea. Fed. R. Crim. P. 11(f). After a defendant who has been advised in accordance with Rule 11 "has sworn in open court that he actually committed the crimes, after he has stated

that he is pleading guilty because he is guilty, [and] after the court has found a factual basis for the plea," *Hyde*, 520 U.S. at 676, there is sufficient assurance that a plea is intelligent and voluntary. At that point, the district court "may, in its discretion, accept a defendant's guilty plea." *Id.* at 674. There is no constitutional basis for supplementing Rule 11's carefully crafted procedures for accepting a plea with a new rule that a plea may not be accepted unless the prosecution has first disclosed to the defendant all material exculpatory information in its possession.

3. The Ninth Circuit's reliance on a defendant's interest in knowing the strength of the prosecution's case before pleading guilty is subject to a further fatal objection. If an understanding of the strength of the government's case were truly necessary in order to permit a defendant to make a voluntary and intelligent plea, disclosure of exculpatory information alone could not achieve that objective. A full understanding of the strength of the government's case can only be achieved through a disclosure of evidence that *inculpates* the defendant as well. The logic of the Ninth Circuit's ruling would therefore require the government to disclose inculpatory as well as exculpatory evidence.

This Court, however, has emphatically rejected the proposition that the Due Process Clause requires the prosecution to disclose inculpatory evidence to the defendant. See *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977); *Agurs*, 427 U.S. at 111 ("we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel"). Indeed, for precisely that reason, the Court in *Agurs* rejected the contention that materiality should be defined by the impact of undisclosed evidence on a defendant's ability to prepare for trial. The Court

explained that a trial preparation standard "would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense." *Id.* at 112 n.20. The Ninth Circuit's decision in this case suffers from the same flaw.

4. Nothing in *Hill* v. *Lockhart*, 474 U.S. 52 (1985), supports the conclusion that the government's disclosure of material exculpatory information is necessary to ensure an intelligent and voluntary plea. In *Hill*, the Court held that a defendant may attack the validity of a guilty plea based on the ineffectiveness of counsel if he can show that counsel's performance was not "within the range of competence demanded of attorneys in criminal cases," *id.* at 56, and that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *id.* at 59. While *Hill* permits a defendant to attack a guilty plea as unintelligent and involuntary if a defendant can show that defense counsel failed to uncover exculpatory evidence that would have caused him to go to trial, that does not imply that the government has an obligation to disclose such evidence.

Hill is based on the Sixth Amendment's specific command that "[i]n all criminal prosecutions, the accused shall * * * have the assistance of counsel for his defence." The Court has interpreted that specific guarantee to encompass "effective" assistance from counsel, because effective assistance from counsel is "critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984). In an adversarial system, counsel's duty to provide effective assistance necessarily includes a duty to assist the defendant in making strategic decisions, including whether it is in the defendant's interest to

plead guilty or to go to trial instead. *Hill*, 474 U.S. at 56-57; *Tollett*, 411 U.S. at 267-268; *McMann*, 397 U.S. at 771.

In contrast, neither the Sixth Amendment nor any other constitutional provision commands that a defendant shall have a right to effective assistance from the prosecution. Nor does any provision of the Constitution require the prosecution to assist a defendant in making strategic choices. That function falls to defense counsel.

Hill itself demonstrates that the prosecution's constitutional obligations to a defendant contemplating a guilty plea do not parallel those of defense counsel. In that case, the Court held that a plea could not be deemed unintelligent or involuntary simply because the *prosecution* did not furnish to the defendant information about his parole eligibility date. 474 U.S. at 56. In contrast, the Court held that a criminal defendant would be entitled to relief from his plea if he could show that *defense counsel*'s failure to inform him accurately about his parole eligibility fell below an objective standard of reasonableness and that it is reasonably likely that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. *Id.* at 56-59. That contrast illustrates the unique responsibility of defense counsel in the adversary system, a duty that the prosecutor does not share. See *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion) ("[A]n accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. * * * The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be.").

There is, in sum, no duty arising from the Due Process Clause for the prosecution to assist the accused in making strategic choices, by providing the accused with a flow of information about the evidentiary strengths and weakness of the prosecution's case. The imposition of any such duty would effectively "displace the adversary system," and "would entirely alter the character and balance of our present systems of criminal justice." *United States* v. *Bagley*, 473 U.S. 667, 675 & n.7 (1985).

C. Requiring The Prosecution To Disclose Material Exculpatory Information To All Defendants Before They Plead Guilty Would Impose Serious Costs On the Criminal Justice System

This Court has observed that plea bargaining is "an essential component of the administration of justice." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971). The Court has also observed that "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Ibid.* Those observations remain true today. Approximately 95% of federal convictions are obtained by guilty plea, and approximately 85% of all criminal defendants in the federal system have their cases resolved through guilty pleas. *Judicial Business of the United States Courts, Annual Report of the Director*, Table D-4 (2000) (available at:*http://www.uscourts.gov/judbus2000/contents.html*).

The Ninth Circuit's rule would fundamentally alter the plea bargaining process and impose a number of serious costs on the criminal justice system. Those serious costs further undermine the court of appeals' due process holding. *Ake* v. *Oklahoma*, 470 U.S. 68, 77

(1985) (Due Process Clause requires a consideration of the extent to which a new requirement would impose costs on the government); *United States* v. *Raddatz*, 447 U.S. 667, 677 (1980) (same).

1. Apart from a duty to comply with discovery orders, the general practice of federal prosecutors is not to disclose to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses. Consistent with that practice, government prosecutors ordinarily do not disclose to a defendant pleading guilty information that could be used to impeach potential government witnesses. The government's desire to protect the identities of cooperating informants, undercover investigators, and other prospective witnesses is based on a well grounded fear that disclosure of such information could disrupt ongoing investigations, and expose prospective witnesses to harassment, intimidation, serious injury, or even death.

Experience demonstrates the validity of that concern. Between 1994 and 2000, the government obtained convictions of at least 467 persons for tampering with, or retaliating against, government witnesses, victims, or informants.[3] Such obstructions of justice are a particular problem in the federal system, because, as the then-Assistant Attorney General for the

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[3] That information is drawn from data provided by the Administrative Office of the U.S. Courts. The figure in the text reflects convictions under 18 U.S.C. 1512 (witness tampering) and 1513 (retaliation), in which those statues represent the lead offense. The total number of convictions under those provisions is likely greater. In addition, witness tampering may be prosecuted under other provisions, such as the omnibus obstruction of justice statute, 18 U.S.C. 1503, or may be taken into account by an increase in a defendant's Sentencing Guidelines range.

Criminal Division explained, federal prosecutors often pursue crimes "in which witness tampering is part of the criminal culture, such as narcotics trafficking, political corruption and large-scale organized crime." See Edward S.G. Dennis, Jr., *The Discovery Process In Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 Wash. U.L.Q. 63, 68 (1990). Under the Ninth Circuit's rule, however, a defendant has the right to obtain, well before trial, impeachment information that in many circumstances could reveal the identities of prospective government witnesses and thereby expose them to tampering efforts, intimidation, or worse.

Federal law and this Court's decisions provide compelling support for the government's standard practice of protecting the identities of prospective witnesses until trial. Congress has required the government to disclose its list of witnesses before trial only in capital cases. See 18 U.S.C. 3432. Moreover, the Jencks Act protects the government's right to withhold statements made by confidential sources and other prospective government witnesses "until said witness has testified on direct examination in the trial of the case." 18 U.S.C. 3500. See also Fed. R. Crim. P. 16(a)(2) (Rules of Criminal Procedure do not authorize discovery or inspection of statements of government witnesses except as provided in 18 U.S.C. 3500). The Jencks Act enables the government to protect the identities of confidential sources and other prospective government witnesses until they become actual witnesses at trial.

On at least two prior occasions, proposals to amend Rule 16 of the Federal Rules of Criminal Procedure to require disclosure of witness lists have been rejected after the Justice Department voiced concerns about the danger to the safety of witnesses. In 1975, Congress

rejected a proposal to amend Rule 16 to provide the defense with the names and addresses of all witnesses that the government intended to call at trial. See Dennis, *supra*, 68 Wash.U.L.Q. at 65. In opposing the provision, "Department of Justice Representatives submitted the results of a survey detailing over 700 instances of witness intimidation, assault or assassination." *Ibid.* (citing *Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 92 (1975) (statement of John C. Keeney, Acting Assistant Attorney General, Criminal Division, Department of Justice)). Congress explained the rejection of the provision as follows:

> A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

H.R. Conf. Rep. No. 414, 94th Cong., 1st Sess. 12 (1975).

More recently, the Advisory Committee on Federal Rules of Criminal Procedure again submitted a proposal to require the government to produce the names and statements of its witnesses before trial. The Justice Department was opposed to the provision. The Judicial Conference of the United States ultimately rejected it. Compare 156 F.R.D. 460, 460-482 (1994) (proposed amendment) with 167 F.R.D. 221, 221-227 (1996) (Court-approved amendment); *id.* at 223 n* ("At its September 19-20, 1995 session the Judicial Confer-

ence did not approve the proposed amendments to Criminal Rule 16.").[4]

This Court's cases have recognized the legitimacy of the government's interest in protecting, until the time of trial, the identity of confidential informants and other prospective witnesses. In *Weatherford*, the Court held that neither *Brady* nor the Due Process Clause requires the government to disclose a list of its witnesses in advance of trial. 429 U.S. at 559. The Court also recognized in *Weatherford* the "necessity of undercover work and the value it often is to effective law enforcement," as well as "the desirability and legality of continued secrecy even after arrest." *Id.* at 557. In *Roviaro* v. *United States*, 353 U.S. 53, 59, 62 (1957), the Court recognized a qualified privilege to withhold the identify of informants even at trial. The Ninth Circuit's ruling fails to accommodate those important law enforcement interests.

2. The Ninth Circuit's rule also permits a criminal defendant to use the guilty plea process as a discovery device to assist in his preparation for trial, in conflict with the principles established in this Court's *Brady* decisions. Under this Court's *Brady* decisions, defendants have a right to use *Brady* information at trial; they do not have a right to use *Brady* as a discovery

[4] The problem of witness intimidation does not mean that the government never provides witness lists before trial. In appropriate cases, the government has done so. See H.R. Rep. No. 247, 94th Cong., 1st. Sess. 13-14 (1975) (discussing practices followed by some U.S. Attorneys in disclosing witness lists, in considering later-rejected proposal to amend Rule 16 to require such disclosure). But a constitutional rule that would *mandate* such disclosure as a prerequisite to a valid guilty plea would eliminate the government's power to protect witnesses when there is a reason to do so.

device to assist in their trial preparation. *Agurs*, 427 U.S. at 112 n.20; see *Weatherford*, 429 U.S. at 557. Accordingly, as the courts of appeals have uniformly held, *Brady* does not require the government to provide a defendant with immediate access to *Brady* material. Instead, the government satisfies its *Brady* obligations as long as it provides *Brady* information to the defendant in time for its effective use at trial. *United States* v. *O'Keefe*, 128 F.3d 885, 989-899 (5th Cir. 1997), cert. denied, 523 U.S. 1078 (1998); *United States* v. *Valencia-Lucena*, 925 F.2d 506, 514 (1st Cir. 1991); *United States* v. *Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988); *United States* v. *Presser*, 844 F.2d 1275, 1285 (6th Cir. 1988); *United States* v. *Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 & n.6 (4th Cir.), cert. denied, 474 U.S. 1005 (1985) ; *United States* v. *Higgs*, 713 F.2d 39, 44 (3d Cir. 1983), cert. denied, 464 U.S. 1048 (1984).

The Ninth Circuit's rule provides a ready mechanism for defendants to advance the time for disclosure, transforming *Brady* from a fair trial right to a trial preparation right. In particular, defendants can be expected to demand immediate access to information on the ground that they are considering whether to plead guilty, and then use the information for trial preparation instead.

3. The Ninth Circuit's ruling also significantly hampers the expeditious resolution of criminal cases through guilty pleas. If the prosecution must routinely disclose *Brady* information (including witness impeachment information under *Giglio*) to every defendant before he pleads guilty, the time and resources devoted to guilty pleas would have to be substantially increased. Under existing federal practice, the trial preparation that is required to uncover such information, particularly information that might impeach government witnesses, does not even begin until it is clear that a

defendant intends to contest his guilt at trial. The problem that is posed by the Ninth Circuit's rule is especially acute because *Brady* requires prosecutors to search the files of all members of the prosecution team —including allied investigative entities—for potentially exculpatory information. *Kyles*, 514 U.S. at 437.

In order to comply with the Ninth Circuit's decision, prosecutors would be required at the guilty plea stage to engage in "the often time-consuming process of determining which witnesses [they] may call at trial, what potential impeachment information on each witness is in [their] possession, and whether [they] must disclose that information to the defendant." Pet. App. 39a (Tallman, J., dissenting). Moreover, in order to decide what information to disclose, prosecutors would have to engage in a highly speculative inquiry into whether particular information would be reasonably likely to lead the defendant to go to trial rather than to plead guilty. That time-consuming and resource-intensive process would destroy a significant part of the value to the government that plea bargaining now affords. See *Brady* v. *United States*, 397 U.S. at 752 (a government interest supporting plea bargaining is that scarce judicial and prosecutorial resources are conserved for other cases).

4. The court of appeals' decision also intrudes on the interest in the finality of guilty pleas. It enables a defendant to attack his plea long after he has solemnly admitted his crime in open court. The essence of a defendant's due process claim at that point is not that his solemn admissions of guilt were false. Instead, the claim is that, if the government had disclosed a particular piece of evidence, the defendant would have recalculated the risks and benefits of his options and insisted

on going to trial rather than pleading guilty. Pet. App. 15a.

As this Court has recognized, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). "The impact is greatest," the Court has emphasized, "when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas." *Ibid.*; *Bousley*, 523 U.S. at 621 ("the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas") (internal quotation marks omitted). An intrusion on finality is particularly problematic when there is no claim that "unfair procedures may have resulted in the conviction of an innocent defendant" (*Timmreck*, 441 U.S. at 784)—the situation that exists when a defendant has admitted his guilt in open court.

5. The Ninth Circuit's rule also deters the government from offering plea bargains that could benefit both the defendant and the government. *Blackledge*, 431 U.S. at 71 (noting that plea bargains can "benefit all concerned"); *Brady*, 397 U.S. at 752 (noting the "mutuality of advantage" that characterizes guilty pleas). When the government uses confidential informants or undercover agents to conduct an investigation into a large-scale conspiracy, it will be reluctant to disclose information that would jeopardize the investigation or the safety of those involved in it. If entering into a plea agreement with a defendant would require the government to disclose such information, the government will likely refrain from entering into the agreement. Similarly, if the government must essentially complete its

trial preparation to comply with its disclosure obligations at the plea agreement stage, the government may decide that it is no longer advantageous to the government to offer such an agreement rather than proceed to trial. Because most defendants benefit from plea bargains, the Ninth Circuit's rule has the perverse consequence of harming the very class of persons its rule seeks to protect.

Broader harms to law enforcement are also threatened by the Ninth Circuit's rule, because the rule would impair the government's flexibility in seeking cooperation from defendants. The government depends on the concessions it gives in plea agreements to induce less culpable defendants to cooperate in investigations and prosecutions so that it can obtain convictions of more culpable defendants. See *United States* v. *Mezzanatto*, 513 U.S. 196, 207-208 (1995) (prosecutors extend "leniency in sentencing" for suspects with information to offer, because "prosecutors often need help from the small fish in a conspiracy in order to catch the big ones"); *United States* v. *Singleton*, 165 F.3d 1297, 1301 (10th Cir.) (en banc) ("[n]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence"), cert. denied, 527 U.S. 1024 (1999). See 18 U.S.C. 3553(e); Sentencing Guidelines § 5K1.1. Where the Ninth Circuit's disclosure rule would deter the government from entering into plea agreements because of the need to protect ongoing investigations, it would preclude negotiations for cooperation. That result will hamper the government in prosecuting violators who are most culpable.

In sum, the Ninth Circuit's disclosure rule is not only unnecessary to ensure the fairness or accuracy of a guilty plea; it also imposes serious costs on the criminal justice system and threatens to disadvantage defendants who are denied favorable plea agreements. The Due Process Clause does not require the imposition of that rule.

II. A CRIMINAL DEFENDANT MAY VALIDLY WAIVE ANY RIGHT HE MAY HAVE TO OBTAIN MATERIAL EXCULPATORY INFORMATION BEFORE PLEADING GUILTY

Even assuming that the principles of *Brady* v. *Maryland* were extended to confer on a defendant the right to obtain material exculpatory information from the government before pleading guilty—and no such extension is warranted—there is no reason why a defendant could not validly waive that right in a plea agreement. Under this Court's decisions, that right, like most other constitutional rights, would be subject to waiver. As this Court explained in *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995), "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." In particular, under this Court's cases, a defendant may waive the right to a double jeopardy defense, *Ricketts* v. *Adamson*, 483 U.S. 1, 10 (1987), the privilege against compulsory self-incrimination, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969), the right to a jury trial, *ibid.*, the right to confront one's accusers, *ibid*, and the right to counsel, *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938).

There is nothing inherent in the right to obtain *Brady* information that would distinguish it from those other rights. If a defendant assisted by competent

counsel decides to plead guilty and is willing to waive his right to obtain whatever material exculpatory information there happens to be in exchange for the possibility of a reduced sentence or other considerations, no sound basis exists to prevent him from doing so.

That is particularly true with respect to the subset of information relating not to substantive evidence of guilt, but to the impeachment of government witnesses. The entire point of receiving impeachment evidence is to assist in the cross-examination of witnesses. If a defendant may validly waive his right to cross-examine witnesses altogether, which the plea of guilty itself accomplishes, *Boykin*, 395 U.S. at 243, he should also be able to waive access to one category of information that may have been useful in conducting such cross-examinations.

This Court in *Mezzanatto* noted that "[t]here may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts." 513 U.S. at 203-204 (internal quotation marks omitted). But the receipt of *Brady* information at the guilty plea stage does not fall within that narrow category. To the contrary, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna*, 423 U.S. at 62 n.2 (emphasis deleted).

* * * * *

The Ninth Circuit accordingly erred in holding that respondent may challenge the government's refusal to recommend a downward departure at sentencing. Respondent's challenge is premised on the theory that

the government was retaliating against her rejection of a plea agreement containing an "unconstitutional waiver of her *Brady* rights." Pet. App. 3a. Because respondent had no *Brady* rights to waive at the plea-agreement stage and because such a waiver would in any event be valid, the proposed plea agreement was constitutional. The government's opposition to a "fast track" departure therefore provides no basis for vacating respondent's sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Rule 11 of the Federal Rules of Criminal Procedure provides in relevant part:

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or

supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self- incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in

open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

* * * * *

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

* * * * *

2. Rule 16 of the Federal Rules of Criminal Procedure provides in relevant part:

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and re-

corded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the

government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other

internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

* * * * *

3. The Jencks Act, 18 U.S.C. 3500, provides in relevant part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

FOR ARGUMENT

Supreme Court, U.S.
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No. 01-595

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANGELA RUIZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether before pleading guilty, a criminal defendant has a constitutional right to obtain material exculpatory information, including impeachment material, from the government.

2. If so, whether that right may be waived through a plea agreement.

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OPINION BELOW

The Ninth Circuit Court of Appeals' opinion is reported at *United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001).

JURISDICTION

The Ninth Circuit entered its judgment on March 5, 2001. The petition for rehearing was denied on June 11, 2001. Pet. App. 40a. The Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the Constitution:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

On August 13, 1999, Respondent was arrested as she attempted to enter the United States driving a vehicle containing 31 kilograms of marijuana. J.A. 25-26.

The government offered Respondent a plea agreement pursuant to the "fast-track" program. J.A. 9-20. That program requires an early guilty plea and that the defendant not file or argue motions. *See Ruiz*, 241 F.3d at 1161. The government's offer required Respondent to (1) waive her right to indictment and plead guilty to an information

charging a violation of 21 U.S.C. §§ 952 and 960; (2) waive substantially all her appellate rights; and (3) waive her right to receive certain *Brady/Giglio*[1] information. J.A. 9, 12, 17-18. The *Brady* waiver provides:

> The government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The government understands it has a continuing duty to provide such information establishing the factual innocence of the defendant.
>
> The defendant understands that if this case proceeded to trial, the government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the government would be required to provide information in its possession that supports such a defense. In return for the government's promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information. J.A. 12.

In exchange, the government offered to make various sentencing recommendations to the District Court, including downward adjustments for role, USSG § 3B1.2, and acceptance of responsibility, *id.* § 3E1.1, and a downward departure based on the "fast-track" program. J.A. 15. The government's recommendations were not binding on the District Court under Fed. R. Crim. P. 11(e)(1)(B).

---

[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

J.A. 14. Respondent could request additional adjustments and departures. J.A. 16.

Respondent declined the offer because she objected to waiving her *Brady/Giglio* rights. Pet. App. 41a. As a result, she was indicted on September 8, 1999, and charged with importation of marijuana, 21 U.S.C. §§ 952 and 960, and possession of marijuana with intent to distribute, 21 U.S.C. § 841. J.A. 7-8.

On October 12, 1999, Respondent entered a guilty plea to the importation charge without a plea agreement. J.A. 22-27. At sentencing, Respondent requested a "fast-track" departure, relying on the facts that she filed no motions, entered a prompt plea, and declined the offer only because of the unconstitutional waiver provision. Pet. App. 41a-43a. The government opposed any "fast track departure" claiming it was "giving up all the benefits that would normally come with the fast track departure." *Id.* at 42a. The District Court denied the request, stating that a "plea bargain [is] a matter of contract that's an offer and acceptance." *Id.* The District Court made no other findings, and sentenced Respondent to a term of 18 months in custody. *Id.* at 43a.

Respondent appealed, arguing that the District Court had discretion to depart, which it did not acknowledge, because the government unconstitutionally insisted on a "*Brady/Giglio*" waiver. The government argued that while it recognized its continuing responsibility to produce exculpatory evidence of the defendant's actual innocence, it could constitutionally seek a waiver of the right to receive material information that went to impeachment or any affirmative defense. *Response Brief for Appellee*

United States, Filed in the Ninth Circuit Court of Appeals, at 24.

The Ninth Circuit reversed and remanded for resentencing. Following *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995), it reaffirmed that a defendant has a due process right to receive material exculpatory evidence in the possession of the government prior to entering a guilty plea. *Ruiz*, 241 F.3d at 1164. The Ninth Circuit concluded that "[t]he disclosure of *Brady* evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a plea." *Id. Ruiz* further held that the right to this necessary predicate to a voluntary and intelligent plea of guilty could not be waived. *Id.* at 1164-65.

The dissent argued various policy considerations militated against the constitutional requirement reaffirmed in *Ruiz*. *Id.* at 1176-77 (Tallman, J., dissenting).

SUMMARY OF ARGUMENT

The Due Process Clause requires that the prosecution provide a defendant with "evidence . . . material either to guilt or punishment" prior to the entry of a guilty plea, just as it requires that same evidence be provided to a defendant who exercises his right to trial. *Brady*, 373 U.S. at 87.[2] The Court's *Brady* jurisprudence is informed by the

[2] Because material exculpatory evidence and material impeachment evidence are constitutionally indistinguishable,

" 'overriding concern with the justice of the finding of guilt.' " *Bagley*, 473 U.S. at 678 (quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976)). That concern should be no less significant in cases where "the finding of guilt" is made pursuant to a guilty plea. Application of *Brady* to guilty pleas will have the effects of (1) ensuring the reliability of guilty pleas by discouraging the innocent from pleading guilty and (2) preserving the reputation of judicial proceedings by preventing prosecutorial authorities from inducing guilty pleas by withholding exculpatory evidence.

The Solicitor General's current position that it need not disclose any *Brady* material at all prior to a guilty plea ignores the Court's observation that it cannot "say that guilty plea convictions hold no hazards for the innocent." *Brady v. United States*, 397 U.S. 742, 757 (1970). The rule that the Solicitor General proposes unjustifiably increases the risk that innocent but risk-averse defendants will accept favorable plea bargains and needlessly demeans the values underlying *Brady*.

In holding that a defendant is entitled to receive material exculpatory evidence prior to entering a guilty plea, the Ninth Circuit joined the Second, Sixth and Tenth Circuits. It holds that just as a guilty plea may be invalidated as involuntary and unknowing due to defense counsel's failure to discover material exculpatory evidence and advise his client accordingly, *see Hill v. Lockhart*, 474 U.S. 52 (1985), the failure of the government to

United States v. Bagley, 473 U.S. 667, 676 (1985), both types of evidence will be referred to collectively as *Brady* information.

disclose such material evidence similarly renders a plea of guilty involuntary and unknowing by compromising defense counsel's ability to provide effective assistance of counsel. *See Sanchez*, 50 F.3d at 1453-54. Because the Sixth Amendment right to counsel, like the Due Process Clause, serves to ensure the accuracy, or reliability, of criminal convictions, *see Strickland v. Washington*, 466 U.S. 668, 691-92 (1984), any other result would be anomalous: defense counsel's failure to discover a particular material fact would invalidate the plea under the Sixth Amendment as unworthy of reliance while the Due Process Clause would tolerate an equally unreliable conviction occasioned by the government's concealment of the same fact.

The Second Circuit's approach is equally compelling: a guilty plea entered in the absence of *Brady* disclosure is invalid as induced by " 'misrepresentation or other impermissible conduct by state agents.' " *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988) (quoting *Brady v. United States*, 397 U.S. at 757). *Miller*'s misrepresentation approach follows closely the analysis undertaken in Justice Blackmun's separate opinion in *Bagley*. *See* 473 U.S. at 682 (Blackmun, J., sep. op.) ("an incomplete response to a specific [*Brady*] request . . . has the effect of representing to the defense that the [*Brady*] evidence does not exist"); *accord id.* at 714-15 (Stevens, J., dissenting). The Second Circuit also applies the materiality standard set forth in *Hill*. *Miller*, 848 F.2d at 1322; *accord Sanchez*, 50 F.3d at 1454.

The Solicitor General's interpretation of the *Brady* trilogy is mistaken. As noted above, both the Ninth and Second Circuit approaches address the application of the

Brady trilogy, concluding that the trilogy is inapplicable under *Hill*. More generally, the Court has never held that a guilty plea cures constitutional errors that go to the reliability of the determination of guilt itself, as opposed to constitutional and other issues which are "independent" of the issue of guilt. *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (post-plea, a defendant "may not thereafter raise *independent* claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea") (emphasis added). The claim that an innocent defendant was induced to enter a guilty plea by a favorable plea bargain that he would not have accepted had there been *Brady* disclosure is in no sense "independent" of the validity of the determination of guilt.

The Solicitor General's reliance on *Ake v. Oklahoma*, 470 U.S. 68 (1985), is misplaced. While a constitutional rule requiring the disclosure of *Brady* material prior to a guilty plea does exact a cost from the prosecution, that cost is more than counter-balanced by the vindication of the "compelling interest of both the States and the individual in accurate dispositions [of criminal accusations]." *Id.* at 79.

Finally, the Ninth Circuit correctly concluded that the right to receive *Brady* material cannot be waived. Because a guilty plea must be knowing and voluntary, and a guilty plea entered without *Brady* disclosure is not knowing and voluntary, *Brady* disclosure cannot be waived. Moreover, some procedural principles are "so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably discrediting the federal courts." *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (citations omitted). As a bedrock due process

right that is directed "to the reliability of the fact-finding process," *id.*, the right to *Brady* material cannot be waived.

ARGUMENT

A. The Due Process Clause Requires That *Brady* Material Be Disclosed Prior to a Guilty Plea.

1. The Principles Underlying *Brady* Require Pre-Plea Disclosure of Material Exculpatory Evidence.

Brady "hold[s] that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87 (emphasis added). Only *material* favorable evidence is subject to disclosure. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). Evidence is material under *Brady* " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different.' " *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *Bagley*, 473 U.S. at 682).

While the Court's *Brady* cases have arisen in the context of defendants challenging the results of their trials or sentencing hearings, the principles articulated in the Court's cases are equally applicable to convictions entered as a result of guilty pleas. *Brady* is animated by the "overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. Because negotiated pleas of guilty are "no more foolproof than full trials to the court

or to the jury," *Brady v. United States*, 397 U.S. at 757, that "overriding concern" is equally applicable in the context of a guilty plea. *See id.* (the Court cannot "say that guilty plea convictions hold no hazards for the innocent"). *Brady* disclosure can only serve to enhance the accuracy of such negotiated pleas by eliminating a major "hazard[ ] for the innocent": the ignorance of material exculpatory evidence possessed by the prosecution. *See generally* Corinna Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 Wash. U. L.Q. 1 (forthcoming April 2002).

The courts have long recognized that " 'there may be circumstances which may induce an innocent man to accuse himself.' " *Von Moltke v. Gillies*, 332 U.S. 708, 719 n.5 (1948) (plurality opinion) (quoting George Bowyer, *Commentaries on the Constitutional Law of England* 355 n.7 (1846)). An innocent defendant offered a reduced sentence pursuant to a plea bargain faces such "circumstances." While an innocent person may always seek vindication though trial, trial is no guarantee: it is widely known that mistakes are made, and serious ones at that. *See, e.g.*, Barry Scheck et al., *Actual Innocence* (2000); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1943 (1992) ("Unfortunately, trials make mistakes. Some innocent defendants – no one knows how many – are convicted."); Frank H. Easterbrook, *Plea Bargaining As Compromise*, 101 Yale L.J. 1969, 1970 (1992) ("Some innocent persons are . . . prosecuted"). As a result, no innocent defendant considering the options of trial, with its potential for acquittal and its downside of a more severe penalty, or plea bargaining, with its assurances of a less severe penalty and

downside of certain conviction, believes that selecting the former option is risk free. *See United States v. Fine*, 975 F.2d 596, 604 (9th Cir. 1992) (en banc) ("[o]verly lenient plea bargains may induce innocent defendants to plead guilty"); *United States v. International Paper Company*, 457 F. Supp. 571, 576 (S.D. Tex. 1978) ("plea bargaining . . . creates the possibility that an innocent person may plead guilty out of fear of conviction and a harsher sentence"); *see also United States v. Timbana*, 222 F.3d 688, 718 (9th Cir. 2000) ("Innocent people may plead guilty, for various reasons. An innocent person may want to take advantage of a discounted sentence in a plea bargain rather than gamble on a far greater sentence if a mistaken verdict is returned.") (Kleinfeld, J., dissenting).

Cases in which prosecutors possess material exculpatory evidence are those in which they will perceive the greatest chance of acquittal and which they therefore have the greatest incentive to resolve though attractive plea bargains. *See generally* Kevin C. McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. 957, 990-92 (1989) (in cases where there is undisclosed material exculpatory evidence, "three factors will tend to converge: questionable guilt, strong inducements to plead guilty in the form of high sentencing differentials, and a defendant who overestimates the government's chances for conviction"). As a result, the pressures created by plea bargaining and the uncertainty associated with trial create a real risk of false self-condemnation,[3] a risk that can be substantially

[3] *See, e.g., Miller*, 848 F.2d 1312 (defendant's concession to factual guilt of several murders set aside where prosecutor suppressed information indicating that another person committed the offenses); *Lewis v. United States*, 985 F. Supp. 654 (S.D.W.V. 1997) (Defendant's conviction for mail fraud set aside where prosecutor suppressed information showing defendant never used U.S. Postal Service to deliver document); *Carroll v. State*, 474 S.E.2d 737 (Ga. App. 1996) (defendant was entitled to withdraw guilty plea to vehicular homicide where prosecutor suppressed information that road conditions contributed to accident and defendant's speed could not be determined); *State v. Gardner*, 885 P.2d 1144 (Idaho App. 1994) (defendant entitled to withdraw vehicular manslaughter plea where prosecutor suppressed eyewitness testimony that victim's death was caused by tire blowout and not defendant's fatigue or drug use); *State v. Johnson*, 544 So.2d 767 (La. App. 1989) (defendant's guilty plea to distribution of marijuana was invalid where prosecutor suppressed strong alibi evidence); *Lee v. State*, 573 S.W.2d 131 (Mo. App. 1978) (defendant entitled to withdraw guilty plea where prosecutor suppressed information that victim made false identification in photo lineup and was shown a picture of defendant before identifying defendant in person); *People v. Curry*, 627 N.Y.S.2d 214 (N.Y. Sup. Ct. 1995) (defendant entitled to withdraw guilty plea to possession of controlled substance where prosecutor suppressed videotaped evidence of police officer shaking down drug dealers, stealing their money, and selling stolen drugs); *Gibson v. State*, 514 S.E.2d 320 (S.C. 1999) (defendant's manslaughter plea set aside where prosecutor suppressed information that the key eyewitness changed her story when confronted by the prosecutor with her inability to have seen the shooting from her claimed vantage point); *Ex Parte Lewis*, 587 S.W.2d 697 (Tex. App. 1979) (defendant's guilty plea invalid where prosecutor suppressed information that defendant was insane at the time of the offense and incompetent to stand trial).

ameliorated by disclosure of material exculpatory evidence.[4]

[4] While the Court has stated that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven

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The Solicitor General and *Amici* States ignore the cases demonstrating that some innocent defendants do plead guilty and complain that pre-plea *Brady* disclosure will also benefit guilty defendants. They ignore the fact that the requirement of *Brady* disclosure is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

The Solicitor General and the *Amici* States concede, as they must, that *Brady* requires a deviation from the adversarial model[5] to ensure that criminal defendants have access to material exculpatory evidence during their trials to prevent the conviction of those hardy innocents who exercise their right to trial. But the Solicitor General and the *Amici* States undervalue the societal interest in avoiding conviction of the innocent by advocating a reading of

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to false self-condemnation," *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citation omitted), counsel cannot advise a client that he will not be wrongly convicted, nor can she account in her advice for evidence that has been suppressed by the prosecution. Counsel can advise her client of the likelihood of conviction and requiring the government to disclose material exculpatory evidence will make that advice more accurate and thus more likely to discourage "false self-condemnation." Such advice is the only real means counsel has to encourage an innocent to brave the risks of trial; short of that there is little counsel can (or perhaps should) do to stop a defendant who wishes to accept a plea bargain. *See generally*, McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. at 988-89.

[5] "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model." *Bagley*, 473 U.S. at 675 n.6.

Brady under which prosecutors need not provide similar protections to those less courageous innocents who contemplate accepting a plea bargain, preferring the certainty of a significant sentencing reduction to the uncertain result of trial. There is no basis for favoring one group of innocents over another: a less courageous innocent is an innocent nonetheless.

Brady is also premised on the prosecutor's role as a unique litigant. *See Brady*, 373 U.S. at 87-88. Due process requires the reasonable doubt standard at trial because "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Winship*, 397 U.S. at 364. The "moral force of the criminal law" is diluted when prosecutors have an incentive "to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." *Sanchez*, 50 F.3d at 1453.[6] Requiring "disclosure [of *Brady* material] will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " *Kyles*, 514 U.S. at 439 (internal quotation omitted). In short, "the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87.

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[6] *Accord* McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. at 997 ("A criminal justice system that condemns concealment of *Brady* material as a due process violation at trial, but not in plea bargaining, essentially encourages prosecutors to divert [cases in which the prosecution possesses undisclosed *Brady* material] into plea bargaining").

Moreover, the *Brady* right is not limited to trial. It applies to "evidence [that] is material either to guilt or to punishment." *Brady*, 373 U.S. at 87.[7] In *Strickler*, Justice Souter made clear the breadth of *Brady*'s application: "the [*Brady*] prejudice enquiry does not stop at the conviction but goes to each phase of the sentencing process: the jury's consideration of aggravating, death-qualifying facts, the jury's discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge's discretionary decision to follow the jury's recommendation." *Strickler*, 527 U.S. at 297 (Souter, J., concurring in part and dissenting in part) (citing *id.* at 292-96 (maj. op.)).[8]

The Court articulates the *Brady* prejudice standard in terms of the effect on the "proceeding," rather than simply using the term "trial." *See, e.g., Strickler*, 527 U.S. at 280; *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *Bagley*,

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[7] Because a defendant who possesses exculpatory evidence will likely receive a more favorable plea offer – i.e., one calling for less punishment – *Brady*'s application to punishment provides an independent basis for disclosure: information that causes the parties to strike an agreement providing for a lesser sentence is "material" as to punishment.

[8] Because it is beyond dispute that *Brady* applies to punishment and that every conviction, whether by guilty plea or by trial, results in punishment of some form, *Brady*'s punishment component is implicated in every case, no matter how the conviction is secured. Given *Brady*'s universal application, the Solicitor General's argument that *Brady* does not apply to cases where the defendant pleads guilty must be understood as urging the Court to find that *Brady* does not apply (at the guilty plea) and does apply (at the sentencing). The Court should not endorse a paradigm in which *Brady* disappears and reappears in a single case.

473 U.S. at 682. While the Court has yet to address *Brady*'s application to guilty pleas, it has made it clear that *Brady*'s application is not limited to trial on liability issues alone.

The Solicitor General argues that "the Court has consistently *limited Brady* to the non-disclosure of exculpatory information that results in the denial of a fair trial by undermining confidence in the reliability of the jury's finding of guilt (or of the resulting sentence)." B.U.S. at 11 (emphasis added); *accord Matthew v. Johnson*, 201 F.3d 353, 361-62 (5th Cir. 2000). The Solicitor General employs the sort of "dubious logic" rejected in *United States v. Knights*, 122 S. Ct. 587 (2001): he argues that the Court's opinions holding that disclosure is required in the context of trial "implicitly hold[ ]" that disclosure is not required when there is no trial. *See id.* at 590-91 (argument "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search not like it" employs "dubious logic"). The Court has done nothing to "limit" *Brady*'s application; it has simply decided the cases before it in the context in which they came to the Court.

2. *Hill* Supports The Conclusion That A Plea Entered Without Disclosure of Material Exculpatory Evidence Is Involuntary.

Even though it involves the Sixth Amendment right to counsel rather than the Due Process Clause, the Court's decision in *Hill*, 474 U.S. 52, strongly supports the Ninth Circuit's view that a guilty plea entered without *Brady* disclosure is "involuntary." The Court's cases

emphasize the role of the advice of counsel in establishing that guilty pleas are voluntarily and intelligently made. *See Brady v. United States*, 397 U.S. at 758. The Court made clear in *Hill*, however, that "[w]here, as here, a defendant is represented by counsel during the guilty plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " 474 U.S. at 56 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Thus, a plea of guilty based upon sub-standard advice is involuntary and therefore invalid. *Id.*; *accord McCarthy v. United States*, 394 U.S. 459, 466 (1968).

In explicating the "prejudice" inquiry at the plea stage, *Hill* employed defense counsel's failure to uncover exculpatory evidence as an illustration.

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Id. at 59. Thus, the failure of counsel to discover a particular exculpatory fact which would likely cause counsel to advise rejection of a plea agreement violates the Sixth Amendment and invalidates the plea.

The Ninth Circuit's pre-plea *Brady* analysis is based upon an analogy to *Hill*: "[e]vidence is 'material' if 'there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial.' " *Ruiz*, 241 F.3d at 1166 (quoting *Sanchez*, 50 F.3d at 1454).[9] *Sanchez* relied on the Second Circuit's decision in *Miller* in adopting this test. *Sanchez*, 50 F.3d at 1454 (citing *Miller*, 848 F.2d at 1322).

Miller's adoption of *Hill*'s test was informed by the Court's derivation of the post-trial *Brady* test. 848 F.2d at 1321. In *Bagley*, the Court adopted the Sixth Amendment materiality test established in *Strickland*, 466 U.S. at 694, as applicable to post-trial *Brady* claims. *See Bagley*, 473 U.S. at 681-82 (Blackmun, J., sep. op.); *id.* at 685 (White, J., concurring). *Kyles* reaffirmed the Sixth Amendment basis of the *Brady* materiality test. *See* 514 U.S. at 433-34.[10]

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[9] The Solicitor General insists that *Ruiz*'s analysis logically compels the conclusion that the government must turn over not only material exculpatory evidence, but also inculpatory evidence in order for the defendant to maximize his knowledge of the government's case prior to pleading guilty. B.U.S. at 20-22. Quite to the contrary, the Ninth Circuit's materiality test can *never* require the disclosure of inculpatory evidence: no defendant could ever claim that "but for the failure to disclose [even more inculpatory evidence], [he] would have refused to plead and would have gone to trial." *Ruiz*, 241 F.3d at 1166. The lower courts' analysis requires no more than the disclosure of material exculpatory evidence. *See, e.g., In re United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001).

[10] *Strickland* itself derived its test from *Agurs*, 427 U.S. at 104, 112-13, and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982), both of which are Fifth Amendment cases. *See Strickland*, 466 U.S. at 694. *Strickland*'s derivation of its test only

Miller relied on the parallel development of the Fifth and Sixth Amendment materiality standards and found it

> useful . . . to look to the Supreme Court's discussion of materiality in *Hill v. Lockhart*, . . . which involved a claim that the defendant's decision to enter a plea of guilty was caused by the ineffective assistance of his counsel.

Miller, 848 F.2d at 1322. Thus, *Miller* held that the *Brady* test should focus on whether the undisclosed evidence created a "reasonable probability" that the defendant "would have insisted on going to a full trial." *Id.*

Miller correctly adopted *Hill*'s Sixth Amendment analysis because both that right and the Due Process Clause serve to provide assurance that criminal convictions are accurate. As the Court explained in *Strickland*, the right to counsel represents "one of the crucial assurances that the result of the proceeding is reliable," *Strickland*, 466 U.S. at 694, and is "critical to the ability of the system to produce a just result." *Id.* at 685. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-92. Reliability requires accuracy.

Hill's recognition that *Strickland* applies to the guilty plea process demonstrates that the Sixth Amendment serves to promote accuracy of the convictions entered

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serves to emphasize the inter-relatedness of the Fifth and Sixth Amendment questions posed by the failure of the government to disclose, and of defense counsel to discover, material exculpatory information.

pursuant to such pleas. In other words, a plea entered without the discovery of material exculpatory evidence is one upon which reliance is not justified.[11]

While the right to counsel is "one of the crucial assurances" of accuracy, it is not the only one: *Brady* also provides such assurances. "[A] *Brady* violation [requires a] showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Thus, like the right to counsel, the Due Process right to *Brady* material serves to produce "a trial worthy of confidence." *Id.* at 434. Given that the trial rights to effective assistance of counsel and access to material exculpatory evidence perform complementary roles in promoting reliable, i.e., accurate, verdicts, it follows that the two rights would also perform complementary roles in promoting reliable, i.e., accurate, guilty pleas. *See Herrera v. Collins*, 506 U.S. 390, 398-99 (1993) (*Brady* and

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[11] The Fifth Circuit's claim that *Brady* does not apply to a guilty plea "proceeding" is based on its observation that when *Bagley* used the term "proceeding" rather than "trial," it derived that term from *Strickland*. *See Matthew*, 201 F.3d at 362 n.13. In employing the term "proceeding" in *Strickland*, the Fifth Circuit argues, this "Court's formulation contemplated a proceeding at which a factfinder was responsible for determining a defendant's *guilt or innocence* . . . ." *Id.* (emphasis added). Separate and apart from the fact that *Strickland* involved a penalty proceeding, not a determination of guilt or innocence, *Matthew*'s suggestion that the Court's Sixth Amendment jurisprudence supports its effort to cabin *Brady*'s Due Process Clause analysis is plainly mistaken: *Hill* demonstrates that a guilty plea is a "proceeding" to which *Strickland* applies.

Strickland guarantee rights that "have the effect of ensuring against the risk of convicting an innocent person").

Rejection of the analysis contained in *Hill* and adoption of the government's approach would lead to anomalous results. For example, in *Jacobson v. United States*, 503 U.S. 540 (1992), the Court found that Jacobson had been entrapped as a matter of law into receiving visual depictions of minors engaging in explicit sexual acts due to the conduct of various government agencies in soliciting orders from him. If Jacobson had entered a guilty plea without knowing that those who solicited him were government actors, thereby foregoing his entrapment defense, the question of whether his plea was voluntary or not would depend – under the government's approach – solely on whether or not his counsel should have discovered the fact that the solicitors were government agents. If counsel should have discovered that fact, Jacobson's plea would be involuntary because he pleaded guilty without knowing a fact reasonably likely to cause him to go to trial: the availability of an entrapment defense. *See Hill*, 474 U.S. at 59. By the same token, if the government had successfully concealed the identity of the solicitors, such that counsel could not have discovered it, Jacobson's plea would suddenly be voluntary.

It would be bizarre indeed if the voluntariness of Jacobson's plea were to depend upon the government's skill at concealing material exculpatory facts. *Hill*, 474 U.S. at 56, makes clear that a plea is not voluntary if the defendant is kept in the dark as to material exculpatory facts; it should not matter who is at fault for the defendant's ignorance. In other words, the identity of the

responsible party is not logically related to the voluntariness of the defendant's plea. If defense counsel is at fault, then the Sixth Amendment provides relief under *Hill* due to the failure of the system to produce a "just result[ ]." *Strickland*, 466 U.S. at 685. But if it is the government that has failed to disclose the information, precluding a "just result," *id.*, then *Brady*'s Fifth Amendment analysis should apply. *See Ruiz*, 241 F.3d at 1165.[12]

Indeed, that is the conclusion that Justice Breyer reached writing for the First Circuit in *United States v. Crooker*, 729 F.2d 889 (1st Cir. 1984). *Crooker* held that the prosecution was required to disclose facts that would have established an entrapment defense prior to a guilty plea, *id.* at 890 (citing *Agurs*, 427 U.S. at 107), and that the failure to disclose such facts, if proved, "would make out the 'manifest injustice' needed to set aside a guilty plea." *Id.*

The Solicitor General argues that *Hill* is irrelevant because a criminal defendant has no "right to effective assistance from the prosecution," B.U.S. at 23, and

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[12] The government's conduct in withholding material exculpatory evidence that cannot be discovered by defense counsel would have the effect of preventing counsel from offering adequate advice at a critical stage of the prosecution. "The Court has uniformly found constitutional error . . . when counsel was . . . prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) (collecting cases); *see also Zacek v. Brewer*, 241 N.W.2d 41, 53-54 (Iowa 1976) (finding guilty plea involuntary and unintelligent because of non-disclosure of "fundamentally unfair police activity [that] deprived [defendant's] counsel of the opportunity effectively to assist [him]").

observes that the Court has "never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for a defendant's plea of guilty to be voluntary." *Hill*, 474 U.S. at 56. The constitutional rule adopted by the Ninth Circuit and the other lower courts serves only to guarantee access to material favorable evidence; it does not even suggest that the government should be required to shoulder a burden analogous to that rejected in *Hill*. Defendants need material exculpatory evidence, not legal advice, from the prosecutor. *See Bagley*, 473 U.S. at 698 (Marshall, J., dissenting) ("it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence").

3. A Plea Entered Without Disclosure of *Brady* Material is Invalid As Based Upon Misrepresentation or Impermissible Conduct By the Prosecution.

The failure to disclose *Brady* information prior to a guilty plea also invalidates a guilty plea because it is based on "misrepresentation or other impermissible conduct by state agents." *Miller*, 848 F.2d at 1320 (citing *Brady v. United States*, 397 U.S. at 757). Because the non-disclosure of *Brady* material is "impermissible conduct by state agents," then "even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." *Id.*[13]

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[13] The Tenth Circuit views "[s]uch claims [as] directly challeng[ing] the voluntary and intelligent nature of the plea."

Miller's approach is supported by opinions of this Court emphasizing that the non-disclosure of *Brady* material is a form of misrepresentation. "The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation . . . ." *Kyles*, 514 U.S. at 432. Justice Blackmun's separate opinion in *Bagley* likewise emphasizes the potential for misleading the defense associated with the non-disclosure of *Brady* material.

> The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. . . . In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it would otherwise have pursued. . . .
>
> We agree that the prosecutor's failure to respond to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

Bagley, 473 U.S. at 682 (Blackmun, J., sep. op.); *accord id.* at 714-15 (Stevens, J., dissenting) ("silence [after a specific *Brady* request] actively misleads in the same way as

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United States v. Wright, 43 F.3d 491, 495 (10th Cir. 1994) (citation omitted).

would an affirmative representation that exculpatory evidence does not exist when, in fact, it does"). *Miller*'s analysis is thus entirely consistent with Justice Blackmun's observation that defendants rely on such nondisclosure in making "pretrial and trial decisions." *Id.*[14]

4. The Lower Courts Agree That *Brady* Applies Pre-Plea.

While this case presents the Court's first opportunity to apply *Brady* in a prosecution involving a guilty plea, lower courts have applied *Brady* to the guilty plea process for years. *See United States v. Walters*, 269 F.3d 1207, 1214 (10th Cir. 2001) ("under certain limited circumstances, 'the prosecution's violation of *Brady* can render a defendant's plea involuntary' ") (quoting *Wright*, 43 F.3d at 496); *United States v. Ross*, 245 F.3d 577, 583 n.1 (6th Cir. 2001) (recognizing that a defendant may file a post-plea *Brady* claim) (citing *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985)); *White v. United States*, 858 F.2d 416, 423-24 (8th

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[14] *Amici* States argue that the majority rule requiring pretrial *Brady* disclosure is out of step with various American Bar Association ("ABA") standards. B.A.S. at 6 n.1, 11. On the contrary, "the ABA Standards for Criminal Justice . . . call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Kyles*, 514 U.S. at 437 (citing ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) and ABA Model Rule of Professional Conduct 3.8(d) (1984)); *see also In the Matter of Grant*, 541 S.E.2d 540 (S.C. 2001) (public reprimand issued to prosecutor who did not disclose *Brady* material prior to a guilty plea). The Standards for Criminal Justice require that disclosure be " 'timely' " and made " 'at the earliest feasible opportunity.' " *Id.*

Cir. 1988) (finding that the exculpatory evidence at issue "was significant and . . . it should have been disclosed" but habeas relief denied due to lack of materiality); *Banks v. United States*, 920 F. Supp. 688, 691-92 (E.D.Va. 1996) (following the cases cited herein); *Gardner*, 885 P.2d 1144 (allowing withdrawal of guilty plea due to *Brady* violation); *Scroggins v. State*, 859 S.W.2d 704 (Mo. App. 1993) ("[t]he principles of *Brady* are applicable to the entry of a plea of guilty") (citation omitted); *State v. Parsons*, 775 A.2d 576, 580-81 (N.J. Super. 2001) (agreeing with *Sanchez*); *Gibson*, 514 S.E.2d at 324-25 (same); *State v. Davis*, 823 S.W.2d 217, 219-20 (Tenn. Ct. Crim. App. 1991) (same as *Gardner*); *Villareal v. State*, 860 S.W.2d 529, 532-33 (Ct. App. Tex. 1993) ("withholding . . . [material] evidence [from a defendant pleading guilty] amount[s] to a denial of [the defendant's] federal and state constitutional rights to due process and due course of law") (citing *Lewis*, 587 S.W.2d at 699-701); *State v. Sturgeon*, 605 N.W.2d 589 (Wis. 1999) (guilty plea withdrawn due to *Brady* violation).

5. The *Brady* Trilogy Supports Recognition of a Due Process Right to Pre-Plea *Brady* Disclosure.

The Solicitor General argues that pre-plea *Brady* disclosure cannot be reconciled with the Court's cases recognizing the constitutionality of plea bargaining and vindicating the interest in the finality of convictions entered pursuant to guilty pleas. *Ruiz* and *Miller* address the Court's decision in *Brady v. United States*, and explain why a plea entered without *Brady* disclosure is invalid. In the event that the Court rejects their analyses, Respondent will address the Solicitor General's arguments.

The Solicitor General argues that there is no net gain in accuracy from pre-plea *Brady* disclosure because "there is no serious risk that an innocent person will be convicted because the prosecution did not disclose exculpatory evidence." B.U.S. at 13. Similarly, he argues that once a defendant "solemnly swears in open court that he has committed the offense, there is no reason to question the accuracy of the resulting entry of a finding of guilt." *Id.* He overlooks the Court's recognition that no guilty plea framework is "foolproof," *Brady v. United States*, 397 U.S. at 758, that defendants do not always make admissions at their guilty pleas, and that cases arise in which it is difficult for a defendant to determine whether he is guilty.

a. Negotiated Guilty Pleas Are Not "Foolproof."

The Court has recognized that "no procedural device for the taking of guilty pleas is so perfect in design and exercise as to warrant a per se rule rendering it 'uniformly invulnerable to challenge.' " *Blackledge v. Allison*, 431 U.S. 63, 73 (1977) (quoting *Fontaine v. United States*, 411 U.S. 213, 215 (1973)). Thus, even though Allison explicitly denied that any promises had been made to induce his plea at the time he entered it, the Court permitted him to assert a later claim that there were such promises and that they went unfulfilled: "the barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable." *Id.* at 74 (footnote omitted). In short, "if, as Allison alleged, he was advised by his counsel to conceal any plea bargain, his denial that any promises had been made might have

been a courtroom ritual more sham than real." *Id.* at 78 (footnote omitted). If a defendant may seek to conceal the promises he received to secure the benefit of his bargain, it follows that he might also falsely declare his guilt, particularly if he receives advice that a favorable plea offer can only be accepted by making such statements.

The Court has also acknowledged that it cannot "say that guilty plea convictions hold no hazards for the innocent." *Brady v. United States*, 397 U.S. at 757.

> This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so whether the conviction is by plea or trial. We would have serious doubts about this case if the encouragement of guilty pleas by offer of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.

Id. The Court's confidence in guilty pleas is based on two assumptions: that defendants receive "adequate advice of counsel," and "that there is nothing to question the accuracy and reliability of the defendants' admissions." *Id.* As to the first assumption, the Court has already held that a plea not meeting that criterion is invalid. *See Hill*, 474 U.S.

52.[15] As to the second, the Solicitor General proposes to undermine the Court's expectation "that there is nothing to question the accuracy and reliability of the defendants' admissions." *Brady v. United States*, 397 U.S. at 757. Indeed, *every* viable post-plea *Brady* claim calls the accuracy of those admissions into question: the disclosure of previously unknown and material exculpatory evidence by definition casts doubt on "the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. Because "guilty plea convictions [hold some] hazards for the innocent," *Brady v. United States*, 397 U.S. at 757, those hazards will be greatly increased if the prosecution gains the ability to withhold material exculpatory evidence.

The Court's decisions affirming the viability of judgments entered pursuant to guilty pleas have not addressed the situation in which the plea is undercut by a claim that goes directly to its viability. The Solicitor General cites *Menna v. New York*, 431 U.S. 61 (1975) (per curiam), for the proposition that " 'a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.' " B.U.S. at 13 (quoting *Menna*, 431 U.S. at 62 n.2). *Menna* followed that observation with its analysis of the question of which constitutional claims were foreclosed by a guilty plea.

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[15] *Hill*'s holding that a claim of ineffective assistance of counsel in the plea process may be asserted after a guilty plea suggests that "those constitutional rights that assure the integrity of the guilty plea process itself" may be asserted after such a plea. McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. at 1022.

> In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.

Menna, 431 U.S. at 62 n.2. The failure to disclose material exculpatory evidence to a defendant contemplating a guilty plea is not "render[ed] irrelevant" by a guilty plea because it is a "constitutional violation[ ] . . . logically inconsistent with the valid establishment of factual guilt." *Id.*

Menna is correct. In *Brady v. United States*, "nothing in the record impeache[d] Brady's plea or suggest[ed] that his admissions in open court were anything but the truth." 397 U.S. at 758. His sole claim was that his plea was motivated by his misapprehension of the availability of the death penalty, a claim "not logically inconsistent with the valid establishment of factual guilt." *Menna*, 431 U.S. at 62 n.2.

Similarly, in *Tollett*, the Court observed that "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea" are foreclosed by the plea. *Tollett*, 411 U.S. at 267. Thus, the "plea in abatement" that Tollett wished to raise on collateral review – a challenge to the racial makeup of the grand jury – was barred by his guilty plea. The improper constitution of Tollett's grand jury, however, said nothing about whether Tollett was guilty; that claim was "not logically inconsistent with the valid establishment of factual guilt." *Menna*, 431 U.S. at 62 n.2.

The defendants in *McMann* also raised an "independent" claim. They argued that if the jurisdiction in which they were convicted had provided a constitutionally adequate method to determine the admissibility of an out of court confession, they would not have entered guilty pleas. *McMann*, 307 U.S. at 768. Their claim was not, however, that the prosecution had somehow suppressed evidence regarding the out of court confession. Instead, "at most[, they asserted] a claim that the admissibility of [their] confession[s] was mistakenly assessed." *Id.* at 769.

Unlike the suppression of material exculpatory evidence, a legal error as to the admissibility of a confession does not directly undercut the accuracy of the admissions in the guilty plea. *Id.* at 773. *Kyles* illustrates the point:

> One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence[, i.e., the confession,] should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

514 U.S. at 435. To use *Tollett*'s terminology, the confession's admissibility is an "independent" constitutional issue that does not undermine confidence in the plea.[16]

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[16] The Court's decision in *United States v. Broce*, 488 U.S. 563 (1989), also involved an "independent" constitutional claim. There, the defendants claimed that even though they entered pleas of guilty to two conspiracies, prosecution on the second was barred by the Double Jeopardy Clause. The *Broce* defendants, however, "pleaded guilty to indictments that on their face described two separate conspiracies." *Id.* at 576. In raising their post-plea Double Jeopardy claim, the *Broce* defendants did not challenge the reliability of their admissions, but rather wished to pursue a legal theory that the two indictments actually referenced a single conspiracy. As the Court pointed out, "[t]hey chose not to, and hence relinquished that entitlement." *Id.* at 571. The fact that their decision may have been a "strategic miscalculation" regarding the applicable law did "not justify setting aside an otherwise valid guilty plea." *Id.* Because there "was nothing to question the accuracy and reliability of the defendants' admissions," *Brady v. United States*, 397 U.S. at 758, the independent Double Jeopardy claim was foreclosed.

b. The Lack of *Brady* Disclosure Compromises the Accuracy of *Alford* and *Nolo Contendere* Pleas.

The Solicitor General's assertion that when a defendant "solemnly swears in open court that he has committed the offense, there is no reason to question the accuracy of the resulting entry of a finding of guilt," B.U.S. at 13, focuses solely on those cases where the defendant makes such admissions. Those concerns are absent in cases where a *nolo contendere* plea is entered, *see, e.g.*, Fed. R. Crim. P. 11(b), or when the defendant pleads guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), without providing a factual basis. Although the Solicitor General claims that it is "unusual"[17] for defendants to enter such pleas, B.U.S. at 16 n.2, nearly every

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[17] Such pleas are more common than the Solicitor General thinks. *Cf. In re Alvernaz*, 8 Cal. Rptr.2d 713, 717-18 (Cal. 1992) ("[t]he declarations of several criminal defense attorneys practicing in San Diego County represented that they could not recall any occasion in which either the district attorney or the trial court had rejected a plea bargain simply because it was [a plea of *nolo contendere*]").

jurisdiction in the United States provides a mechanism for pleas of *nolo contendere* or *Alford* pleas.[18]

In any event, even where there is a factual basis provided, *Hill*, 474 U.S. 52, still provides a basis to challenge a guilty plea: it contains no exception for cases in which the defendant provides a "factual basis." *See also* Fed. R. Crim. P. 32(e) (permitting guilty plea to be withdrawn prior to sentencing for "any fair and just reason" and also containing no "factual basis" exception).

c. Some Defendants Cannot Determine Their Guilt or Innocence Absent *Brady* Disclosure.

Brady disclosure will also serve to prevent miscarriages of justice in cases involving offenses containing elements that are either outside the defendant's knowledge or are based upon application of objective standards. As for the former category of offenses, numerous crimes contain elements that are outside the defendant's personal knowledge. For example, a number of offenses require that the victim be under a certain age. A defendant may well not have personal knowledge of the victim's age and lack access to evidence that calls that element into question, evidence that the government may possess due to its superior access to the victim or to confidential records. Similarly, in a bank robbery case, *see* 18 U.S.C. § 2113(a), a defendant would typically lack any

[18] *See*, Note, *The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 Iowa L. Rev. 1063, 1067 n.49 (1987) (collecting cases).

personal knowledge of the FDIC insurance element that the government may possess.[19] Even the availability of certain defenses may turn on facts outside the defendant's knowledge, as is the case in entrapment, in which the defendant may not know that the person who solicited him was a government agent. *See Crooker*, 729 F.2d at 890.[20] In these hypotheticals, the defendant lacks conclusive knowledge of his guilt or innocence, thus making pre-plea disclosure of exculpatory evidence even more significant. *See generally* McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. at 972-75.

[19] The Solicitor General acknowledges that a defendant will occasionally be unable to determine guilt or innocence, but he insists this situation is rare and does not justify imposition of a constitutional disclosure requirement. B.U.S. at 14 n.1. He again ignores the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

[20] The Solicitor General suggests that Respondent could determine her own guilt and did so when she entered her plea of guilty. B.U.S. at 14 n.1. As he has acknowledged, however, the issue in this case is whether or not it was constitutional for the prosecutor to insist that she waive her right to *Brady* material as a condition of a plea bargain. *Id.* at 9. At any rate, it is extremely unlikely that Respondent had actual knowledge of whether or not the substance secreted in the vehicle actually was marijuana. If she were to waive her right to *Brady* disclosure, she would then bear the risk that the substance proved to be benign. *Cf.* Holly Becka & Tim Wyatt, *Fake Drugs Cast Doubt on 24 Cases: Police Study Procedures After Evidence Is Found To Be Crushed Wallboard*, Dallas Morning News, January 15, 2002, at 1A, available at 2002 WL 2007783 (nearly half of all "cocaine" seized by Dallas police in 2001 was finely crushed wallboard, requiring reconsideration of numerous convictions, including several in which guilty pleas were entered).

As to the latter category, numerous defenses and offense elements turn on the analysis of objective factors, such as the reasonableness of one's conduct or the justifiability of a particular course of conduct. *See generally id.* at 976-80 ("It is problematic to expect the typical defendant pleading guilty to provide accurate answers to questions such as the reasonableness of the defendant's conduct or belief, or the justifiability of taking a particular risk, in the same way that we rely on a defendant pleading guilty to reveal the truth about his own conduct or subjective mental state"). Again as an example, a claim of self defense frequently requires a showing of the reasonableness of the defendant's fear, an objective fact that could be corroborated by facts of which the defendant was unaware. *See, e.g., United States v. James*, 169 F.3d 1210, 1214-15 (9th Cir. 1999) (defendant's self defense theory was corroborated by documentary proof of victim's prior violent acts even though the defendant had never reviewed the documents). Because "[s]elf-defense is about as basic a moral and legal principle there is," *id.* at 1215 (citations omitted), no legitimate policy could be served by allowing James to enter a guilty plea without disclosure of the documents which corroborated the victim's violent past had she been unaware of them and had the government possessed them. Objective determinations are frequently required in offense elements as well.[21]

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[21] In *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court considered a case involving a homicide statute which permitted a finding of increased liability based upon what was apparently a purely objective standard. *Henderson* involved a homicide in which a second degree murder charge was filed, but the defense

Procedural protections like those contained in Fed. R. Crim. P. 11 cannot compensate for the lack of *Brady* disclosure in such cases. While Rule 11(f) does require the district court to satisfy itself that there is a factual basis for a guilty plea – but not for a plea of *nolo contendere* – that inquiry is sharply limited. For example, a failure to inquire into the applicability of an affirmative defense "does not even violate the technical requirements of Rule 11. Nothing in Rule 11 requires the trial judge to inform the defendant of every possible defense he may have." *Dismuke v. United States*, 864 F.2d 106, 107 (11th Cir. 1989) (per curiam); *accord United States v. Smith*, 160 F.3d 117, 123 (2d Cir. 1998). Therefore, if the prosecution withholds information establishing an affirmative defense, Rule 11 does nothing to protect a defendant ignorant of the material facts.

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contended that a manslaughter charge was more appropriate under the facts, including the defendant's limited mental abilities. The second degree murder charge, however, included as an element the requirement that the "assault was committed with a design to effect the death of the person killed." *Id.* at 645 (internal quotations, footnotes omitted). The Court observed that the crucial "element of the [second degree murder] offense might have been proved by the objective evidence *even if respondent's actual state of mind was consistent with innocence or manslaughter.*" *Id.* (emphasis added). Thus, the existence of objective evidence – of which the defendant may not have been aware – may have been dispositive. The failure to disclose exculpatory evidence relevant to this objective standard could lead to a plea of guilty by a defendant whose "actual state of mind was consistent with innocence or manslaughter." *Id.*

6. The Policy Arguments Offered by the Solicitor General and the *Amici* States Are Far Outweighed By the Individual and Societal Interests In Not Convicting the Innocent.

Citing *Ake*, 470 U.S. at 77, the Solicitor General, B.U.S. at 24-33, advances a number of policy justifications for his view that innocent defendants contemplating the choice between trial and plea bargaining should not have the benefit of material exculpatory evidence possessed by the government. Because such disclosure is essential to a valid guilty plea, *Sanchez*, 50 F.3d at 1453, these arguments are foreclosed. Even if they are not, they are unconvincing.

Ake identifies three relevant factors:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

470 U.S. at 77 (citations omitted). Although the Solicitor General does not mention it, as to the first factor, "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling," and that interest "weighs heavily in [the Court's] analysis." *Id.* at 78.

As to the second factor, his analysis is doubly flawed: it ignores the sovereign's interest in accurate determinations of criminal liability and fails to account for the requirement of materiality in his strident claims that

adopting the majority view that *Brady* applies to plea bargaining will radically change the prosecution of criminal offenses. The sovereign has a "compelling interest . . . in accurate dispositions of criminal accusations." *Id.* at 79. As a result, "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id.* That is precisely what the Solicitor General seeks to do here: he wishes to maintain "a strategic advantage over the defense," at the cost of encouraging innocents to accept plea bargains.

Moreover, while the Solicitor General and the *Amici* States identify a number of perceived negative consequences of pre-plea application of *Brady*, they fail to address *Brady*'s inherent limitation: it only applies to *material* exculpatory evidence. For example, the Solicitor General expresses concern that prosecutors may be required to make disclosures that would disrupt undercover investigations and endanger witnesses. B.U.S. at 25-28. But *Ruiz* does not require the wholesale disclosure of the identities of informers, although occasionally it may. It does so only when the information is material. *Sanchez* illustrates this point: Mr. Sanchez did not prevail because his assertion that he would have pursued entrapment and outrageous governmental misconduct claims if he had known the identities of the informants was rejected because it was not objectively reasonable. *See* 50 F.3d at 1454. The evidence he was denied was neither material nor subject to disclosure. *Id.* In those cases where the information is material, such as those where a defendant who is not predisposed to commit drug offenses is

induced to do so by a government informant, the balance, as tilted by the antecedent determination of materiality, properly favors disclosure.[22]

The argument that *Ruiz* advances the availability of discovery and creates a burden on prosecutors by requiring them to collect and assess evidence at an earlier stage in order to determine if it constitutes *Brady* material is equally unavailing. B.U.S. at 28-30. As an initial matter, application of *Brady* prior to a guilty plea does not modify the basic timing requirement of *Brady* disclosure: it must be disclosed in time for effective use at the proceeding. *See Coppa*, 267 F.3d at 142 ("*Brady* material must be disclosed in time for its effective use . . . at a plea proceeding").

As to the pre-plea assessment of the evidence, the Solicitor General seems to complain only about gathering impeachment evidence. B.U.S. at 29-30; *see also* B.A.S. at 12-15. Again, only material impeachment evidence must be disclosed. The Solicitor General complains that the prosecutor will be required to engage in " 'the often time-consuming process of determining which witnesses [they] may call at trial, what potential impeachment information on each witness is in [their] possession, and whether [they] must disclose that information to the

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[22] *Amici* States claim that *Ruiz* requires extensive disclosures regarding crime victims. B.A.S. at 12-13. The States make no effort to demonstrate that such disclosures are likely to be material. *Id.* Moreover, they ignore the availability of other measures, such as protective orders, to address such concerns. *See, e.g.*, Fed. R. Crim. P. 16(d)(1); *see also Ritchie*, 480 U.S. 39 (approving in camera submission to trial court of sensitive information).

defendant.' " B.U.S. at 30 (quoting *Ruiz*, 241 F.3d at 1176-77 (Tallman, J., dissenting)). Because only the most significant impeachment material would be termed "material," *see Sanchez*, 50 F.3d at 1454, it is hard to imagine that anything other than significant impeachment of a significant prosecution witness would ever qualify. It is hardly burdensome to ask a prosecutor to know who her most important witnesses are and whether they are subject to dramatic impeachment.[23]

The government's concern for the finality of judgments, *B.U.S.* at 30-31, is addressed in *Hill*, which concluded that "requiring a showing of 'prejudice' from defendants who seek to challenge the validity of guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas." 474 U.S. at 58 (citation omitted); *see also Strickland*, 466 U.S. at 694 ("[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker"). Because any successful *Brady* claim includes, by definition, a showing of materiality, *Strickler*, 527 U.S. at 281-82, the pre-plea disclosure rule adopted by the lower courts provides precisely the same assurance that the finality of judgments will not be unnecessarily disturbed.[24]

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[23] A prosecutor may delegate the duty to search for impeachment material. *See United States v. Jennings*, 960 F.3d 1488, 1491-92 and n.3 (9th Cir. 1992).

[24] The lack of *Brady* disclosure calls into question whether a plea secured by withholding material exculpatory evidence gives rise to a legitimate expectation of finality on the part of the State. In *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), the Court

Also, the government's complaint about having to do more work at the initial stages of a case conflicts with its contentions regarding finality. Assuming *Brady* disclosure, some *Hill* claims will be foreclosed because a criminal defendant cannot claim that his lawyer failed to discover evidence that the prosecutor disclosed. By the same token, whenever the prosecution fails to disclose material evidence, it lays the groundwork for a potential *Hill* claim: the defendant can always argue that the lawyer should have discovered on her own what the prosecution withheld. The prosecution can eliminate future *Hill* claims, and enhance accuracy, by disclosing *Brady* material.

The government's concern about the plea bargaining process also "focuse[s] entirely on [its] incentives and completely ignores the other essential party to the transaction: the [defendant]." *Mezzanatto*, 513 U.S. at 207. While a prosecutor may wish to do even less work in a plea bargain case, a defendant is often less likely to accept a plea agreement where he must give up his right to receive exculpatory information, as exemplified by what happened in this very case. *See also* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's*

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permitted a defendant who had entered a guilty plea to challenge the determination that his confession was admissible on collateral review because the law of the state in which he entered his plea permitted an appeal of that issue. As a result of that state law, there was no "legitimate expectation of finality." *Id.* at 289-90. Because the failure to disclose *Brady* material is essentially a misrepresentation, *Miller*, 848 F.2d at 1320, a State cannot harbor a "legitimate expectation of finality" in such a plea because it has unclean hands.

Guide To Loss, Abandonment and Alienation, 68 Fordham L. Rev. 2011, 2043-44 and n.189 (2000) (impasse in plea negotiations created by *Brady* waiver issue).

Moreover, the Solicitor General will not dispute that the "fast-track" plea bargain program in the Southern District of California has survived in the wake of *Ruiz*. That program has proceeded in the same fashion, simply without the inclusion of *Brady* waiver provisions in the plea agreement.[25]

To the extent that *Brady* waivers relieve prosecutors of their duty to collect and evaluate potential *Brady* evidence, due process concerns are demeaned. *See Strickler*, 527 U.S. at 280 ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police"). As to any claim of difficulty in assessing such information pre-plea, *Kyles* counsels prosecutors to err on the side of disclosure. 514 U.S. at 439 ("Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on the trial's outcome as to destroy confidence in its result"). There is no reason to believe that the pre-plea *Brady* test is any more difficult to apply than the post-trial

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[25] The Solicitor General has provided no evidence that the absence of *Brady* waivers will have a devastating impact on criminal investigations and prosecutions. *See Mezzanatto*, 513 U.S. at 209 n.6 ("Respondent has failed to offer any empirical support for his apocalyptic predictions").

test; the government "cannot avoid [its] responsibility" to ensure that guilty pleas are entered knowingly and voluntarily. *Id.*

In short, the policy arguments raised by the Solicitor General do not outweigh the "compelling interest of both the States *and* the individual in accurate dispositions." *Ake*, 470 U.S. at 79 (emphasis added). Because the procedural safeguards sought will substantially reduce the possibility of inaccurate guilty pleas and convictions, *id.* at 77, the balancing test contained in the third *Ake* factor strongly favors recognition of a pre-plea *Brady* right.

B. The Right To Pre-Plea *Brady* Disclosure Cannot Be Waived Because It Is Necessary to a Knowing and Voluntary Plea and Because Such Disclosure Is Fundamental to the Reliability of the Fact-Finding Process.

The Solicitor General also contends that, even if a defendant has a right to receive *Brady* information before pleading guilty, that right can be waived in a plea agreement. B.U.S. at 33-34. As an initial matter, the Solicitor General does not challenge the Ninth Circuit's conclusion that *Brady* rights cannot be waived in a plea agreement because they are essential to a valid guilty plea. *See Ruiz*, 241 F.3d at 1164-65 (analogizing to the widespread rule among the courts of appeals that ineffective assistance of counsel claims cannot be waived in a plea agreement because they undermine the validity of the plea itself). Consistent with this conclusion, the Court has stated that if a guilty "plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived

it of validity as a waiver of his right to assail the conviction." *Waley v. Johnston*, 316 U.S. 101, 104 (1942).

In other words, if the Court determines that the failure to disclose *Brady* information invalidates a guilty plea, then it must also conclude that the right to receive *Brady* information cannot be waived in a plea agreement. Given the Solicitor General's failure to dispute this reasoning, the only way that his waiver argument becomes relevant is if the Court determines that a defendant has the right to receive *Brady* information in the guilty plea context, but that the disclosure of such information is not required to ensure a valid guilty plea. Even if the Court takes this route, however, it should still determine that waiver cannot apply.

While the Solicitor General correctly states that the Court has recognized that many fundamental rights are waivable, *see Mezzanatto*, 513 U.S. at 201, he incorrectly contends that the right to receive *Brady* information is indistinguishable from such waivable rights. B.U.S. at 33. Instead, the right to receive *Brady* information is one of those rights that "are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discrediting the federal courts.' " *Mezzanatto*, 513 U.S. at 204 (citation omitted). The credibility of the criminal justice system would be diminished if courts were to accept guilty pleas while prosecutors silently stood by knowing that there was information pointing to innocence.

Moreover, our guilty plea " 'system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties. . . . ' "

Id. at 205 (quoting *United States v. Olano*, 507 U.S. 725, 742 (1993) (Kennedy, J., concurring)). *Brady* rights are rooted in the structural integrity of the justice system and therefore should not be compromised because two parties, perhaps out of a desire to resolve a case so that they can "concentrate on matters they deem more pressing[,]" believe that it is a good idea to bargain them away. *Olano*, 507 U.S. at 742 (Kennedy, J., concurring).

When considering the availability of waiver, it is important to emphasize that *Brady* does not simply bestow personal rights upon a defendant but also imposes obligations upon prosecutors that are designed to protect the integrity and truth-seeking purpose of the criminal justice system as a whole. *See Kyles*, 514 U.S. at 439. In other words, *Brady* rights are also rooted in the public interest, and therefore a defendant and a prosecutor cannot simply waive their applicability in a plea agreement. *See Plea Bargain Waivers*, 68 Fordham L. Rev. at 2080.[26] *See also Peretz v. United States*, 501 U.S. 923, 937 (1991 ("a litigant may not waive structural protections"); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945) (private rights "charged or colored with the public interest" cannot be waived where waiver will defeat public interest).

The truth-seeking function of *Brady* rights is designed to instill public confidence in the outcome of criminal proceedings. As Justice Kennedy explained when writing for the Ninth Circuit, waiver is not available for rights

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[26] The cited article also takes a multi-disciplinary approach in concluding that *Brady* rights cannot be waived. *See* Blank, *Plea Bargain Waivers*, 68 Fordham L. Rev. at 2060-85.

that are designed to instill such confidence. *See United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (The right to a unanimous verdict under Fed. R. Crim. P. 31 cannot be waived because it "has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict. . . . ").[27]

It is for these reasons that the right to receive *Brady* material is distinguishable from the various waivable constitutional rights listed by the Solicitor General. B.U.S. at 33. For example, the purely personal protections bestowed by the Double Jeopardy Clause have nothing to do with the truth-seeking process. Thus, the availability of waiver is not surprising. Likewise, it is not surprising that waiver is available for the privilege against compulsory self-incrimination because, unlike the *Brady* right to *disclosure* of information, it is a personal right that involves the *suppression* of evidence and therefore does

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[27] Although *Brady* is designed to instill public confidence in the accuracy of our criminal justice system, the likely outcome of the Solicitor General's waiver position is that *Brady* will hardly ever apply. "[D]efendants are generally in no position to challenge demands for [such] waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice." *Mezzanatto*, 513 U.S. at 216 (Souter, J., dissenting). Indeed, the waiver provision disputed in this case was a standard provision in a standard plea agreement in the Southern District of California. Given that the overwhelming majority of defendants plead guilty, the standardization of these waiver provisions will mean that *Brady* will hardly ever apply. Thus, accepting the Solicitor General's argument will likely serve to transform a fundamental right into a vestigial one.

not enhance the truth-seeking process. *See Mezzanatto*, 513 U.S. at 204 (allowing waiver of the right because it involved the suppression of evidence and therefore did not "*enhance*[ ] the truth-seeking function" of the federal criminal justice system) (emphasis in original).

Furthermore, while the rights to jury trial and to confront witnesses certainly enhance the search for truth,[28] they are only waivable through the guilty plea process, *see Boykin v. Alabama*, 395 U.S. 238, 243 (1969), a process designed to protect the public's interest in accurate outcomes. In other words, these rights are not waivable in all respects but instead are only waivable to the extent that the waiver does not diminish society's interest in the reliable disposition of criminal cases. For example, with respect to the right to a jury trial, it is highly doubtful that a defendant could contest guilt at a trial where he waived the right to a jury and instead " 'stipulated to trial by 12 orangutans. . . . ' " *Mezzanatto*, 513 U.S. at 204 (quoting *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985)). Likewise, with respect to the right to confront witnesses, it is doubtful that a defendant could agree to contest his guilt at a trial where he would be prohibited from conducting cross-examination.[29]

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[28] The right to counsel also enhances the truth-seeking process, but waiver of that right must be available so that the right to represent oneself can be honored. *See Faretta v. California*, 422 U.S. 806 (1975).

[29] In pointing out that the right to confront witnesses may be waived, the Solicitor General contends that, at the very least, waiver should be available for the right to receive impeachment information, which is used for cross-examination. B.U.S. at 34. The Court, however, has specifically rejected any distinction between impeachment evidence and other exculpatory evidence. *See Bagley*, 473 U.S. at 676.

Finally, even if the Court were to determine that the right to receive exculpatory information is indistinguishable from the waivable rights listed by the Solicitor General, it should nonetheless prohibit *Brady* waivers because they "severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining." *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring, joined by O'Connor and Breyer, JJ.). As argued earlier, the facts of this case and the district-wide controversies created in other federal courts, *see* Blank, *Plea Bargain Waivers*, 68 Fordham L. Rev. at 2043-44 and n.189, demonstrate that *Brady* waivers seriously disrupt the plea bargaining process. Accordingly, such waivers should be prohibited.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 01-595

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent contends that the Constitution requires the prosecution to provide material exculpatory information to a criminal defendant before he pleads guilty. That position is neither required nor supported by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and it is not encompassed within *Brady*'s concern for the reliability of criminal convictions. Nor does the principle that a plea of guilty must be intelligent and voluntary support the requirement urged by respondent. In almost all cases, defendants know whether they have committed an offense; they do not need to know the weaknesses in the government's trial strategy in order for their pleas to be reliable, intelligent, and voluntary. Even if defendants had a right to receive material exculpatory information before pleading guilty, however, that right, like virtually all other constitutional rights, may be waived by a defendant wishing to plead guilty.

Respondent argues that the court of appeals' disclosure requirement is necessary to protect innocent defendants from pleading guilty. But current law

already provides extensive procedural protections to guard against that danger. When a defendant is assisted by competent counsel and a court determines after a thorough inquiry pursuant to the exacting and carefully developed standards of Rule 11 of the Federal Rules of Criminal Procedure that the plea is intelligent and voluntary, there is sufficient assurance that the defendant is pleading guilty because he is, in fact, guilty.

The rule proposed by respondent would serve an entirely different purpose and would produce unfortunate consequences. It would require the government to prepare its case and evaluate its witnesses on a defendant's timetable, allow criminal defendants to learn about the weaknesses of the government's case so that they can better calculate whether they should plead guilty or go to trial, and perhaps to share that information with co-conspirators, and it would discourage plea bargains by prosecutors. The Constitution does not require government prosecutors to assemble and disclose their cases for the purpose of assisting criminal defendants in deciding whether to plead guilty, and any such requirement would fundamentally alter the nature of the adversary system and adversely affect the criminal justice system.

A. *Brady* v. *Maryland* Does Not Require A Prosecutor To Disclose Material Exculpatory Information To A Criminal Defendant Before He Pleads Guilty

1. Brady is a fair trial right

Respondent contends (Br. 8-15) that the court of appeals' holding that a criminal defendant has a constitutional right to receive material exculpatory information before pleading guilty is supported by *Brady* v. *Maryland*, 373 U.S. 83 (1963). But *Brady* and the

decisions applying it hold no more than that the government has a duty to disclose exculpatory information when such disclosure is necessary to ensure a fair trial. *Brady*, 373 U.S. at 87-88; Gov't Br. 10-14 (discussing cases applying *Brady*). Because a criminal defendant who pleads guilty waives his right to a trial, the prosecutor's duty to disclose material exculpatory information under *Brady* never arises in the guilty plea context. And waiving the right to trial implicitly waives the right to information that the Court has found necessary to a fair trial. *Orman* v. *Cain*, 228 F.3d 616, 617 (5th Cir. 2000) ("*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads guilty."); *Matthew* v. *Johnson*, 201 F.3d 353, 360 (5th Cir.) ("The prosecutor's duty to disclose material exculpatory information * * * exists to ensure that the accused receives a fair trial, i.e., that an *impartial party's* assessment of the defendant's guilt is based on all the available evidence."), cert. denied, 531 U.S. 830 (2000).

Respondent's observation (Br. 14) that *Brady* applies to sentencing proceedings does not alter that conclusion. The right to a fair *trial* embraces not only contested issues of guilt, but also contested issues concerning punishment. *Brady*, 373 U.S. at 87-88. It does not embrace a proceeding in which a defendant chooses to admit guilt and waives a trial. *United States* v. *Agurs*, 427 U.S. 97, 104 (1976) ("the holding in *Brady*" is based on "a concern that the suppressed evidence might have affected the outcome of the trial").

2. *Disclosure of material exculpatory information is not necessary to ensure the reliability of a guilty plea*

a. Contrary to respondent's contention (Br. 8-9), the policies underlying *Brady* do not support the significant extension of *Brady* to the guilty plea context. The purpose of *Brady* enunciated repeatedly by this Court is to guard against the risk that an innocent defendant will be found guilty because the government withheld evidence. *E.g.*, *United States* v. *Agurs*, 427 U.S. 97, 112 (1976) (*Brady*'s "overriding concern" is with the "justice of the finding of guilt"); Gov't Br. 11-12. When a defendant pleads guilty with the assistance of counsel, and the court accepts the plea after taking steps to ensure its validity, there is no serious risk of that happening.

Except in the most unusual circumstances, a defendant who is assisted by competent counsel knows whether he has committed the charged offense. He does not need access to the government's files to make that determination. That does not mean that a guilty plea is "foolproof" or that it holds "no hazards for the innocent." *Brady* v. *United States*, 397 U.S. 742, 757-758 (1970). An innocent defendant may plead guilty because he lacks knowledge about the nature of the offense or the consequences of the plea, because he is incompetent, or because he is coerced. Before accepting a guilty plea, a district court therefore must take steps to ensure that the plea does not result from those factors. *Boykin* v. *Alabama*, 395 U.S. 238, 244 (1969); see also Rule 11 of the Federal Rules of Criminal Procedure. But once a district court takes those steps, there is no reason to question the reliability of the plea or the resulting finding of guilt. At that point, a court

may accept as reliable the defendant's sworn assertion that "he actually committed the crime[]," and that "he is pleading guilty because he is guilty." *United States* v. *Hyde*, 520 U.S. 670, 676 (1997).

Respondent asserts (Br. 9-11) that there remains a serious risk that innocent defendants will plead guilty in order to obtain a more lenient sentence and that disclosure of exculpatory information is necessary to counteract that risk. But this Court has rejected the premise of that claim. In *Brady* v. *United States*, 397 U.S. at 758, the Court expressed its confidence in the reliability of guilty pleas where the defendant is assisted by competent counsel and the court assures itself of the voluntariness and intelligence of the plea:

> We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.

In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978), the Court reiterated that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation." Respondent offers no evidence to the contrary that would justify a new constitutional rule requiring the prosecutor to

develop and disclose material exculpatory information to all defendants before they plead guilty.

b. As respondent notes (Br. 32), in rare cases, a defendant may not know whether he is guilty because a fact that is crucial to his guilt is outside his knowledge. A person accused of statutory rape may not know the age of a victim; a person accused of bank robbery may not know whether the bank is federally insured; a person induced to commit an offense he had no predisposition to commit may not know that the person who solicited his participation was a government agent. But in those relatively unusual cases, a defendant may be able to discover the relevant facts through a reasonable investigation or through the exercise of his discovery rights under Rule 16 of the Federal Rules of Criminal Procedure. And if he cannot, he may exercise his right to go to trial and require the government to prove its case. A defendant, after all, has neither an obligation nor a constitutional right to plead guilty. *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). Alternatively, such a defendant may tender a plea, while maintaining his innocence, a procedure that is safeguarded by the requirement that the court find "strong evidence of actual guilt" before accepting the plea. *North Carolina* v. *Alford*, 400 U.S. 25, 37 (1970).

Moreover, whatever the prosecutor's obligations may be in cases in which the prosecutor knows that a defendant lacks knowledge about a fact that is crucial to his guilt, those exceptional cases cannot justify the court of appeals' holding that *every* prosecutor has a constitutional duty to disclose material exculpatory information to *all* defendants contemplating a guilty plea in *all* cases. In this case, for example, respondent knew all the facts that were necessary to establish her guilt. She had no need to know whether the government

possessed material exculpatory information in order to enter a reliable plea. When defendants know whether they have committed the charged offense, there is no sound basis for arguing that disclosure of material exculpatory evidence is necessary to ensure the reliability of a plea.*

c. The court of appeals' materiality standard demonstrates that its disclosure rule is not even designed to ensure the reliability of a guilty plea. The court of appeals did not define materiality by reference to whether the undisclosed information would undermine confidence in the reliability of the plea. See *United States* v. *Bagley*, 473 U.S. 667, 678 (1985) ("Consistent with 'our overriding concern with justice of the finding of guilt,' a constitutional error occurs [under *Brady* v. *Maryland*], and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."). Instead, the court defined materiality by reference to whether the information would be reasonably likely to lead a defendant to reject a plea and go to trial. Pet. App. 15a. The court of appeals' disclosure rule is therefore aimed at assisting criminal defendants in making a strategic choice about whether to plead guilty or go to trial; it does not serve to ensure that guilty pleas are reliable. Accordingly, the court of appeals' rule has no grounding in *Brady*'s "overriding concern"

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* Respondent advances the post hoc extra record speculation (Br. 33 n.20) that it is "extremely unlikely" that she had actual knowledge that the substance secreted in her vehicle was marijuana. But respondent admitted under oath at her plea hearing that she knew there was marijuana in the vehicle, J.A. 26, and respondent offers no new evidence that would contradict that sworn statement.

with "the justice of the finding of guilt." *Agurs*, 427 U.S. at 112.

3. The prosecutor's unique role is not implicated here

For similar reasons, the court of appeals' disclosure rule is not supported (Resp. Br. 13) by *Brady*'s focus on the prosecutor's unique role as the representative of a sovereignty whose interest "is not that it shall win a case, but that justice shall be done." *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995). A prosecutor's interest in ensuring that justice is done does not extend to assisting defendants in making strategic choices about whether to plead guilty. The imposition of such a duty would "displace the adversary system" and "would entirely alter the character and balance of our present systems of criminal justice." *Bagley*, 473 U.S. at 675 & n.7.

Nor can the extension of *Brady* to the defendant's deliberations on whether to plead guilty be justified (Resp. Br. 13) by a desire to remove a prosecutor's incentive to withhold evidence so that the prosecutor can secure such a plea. To the extent that respondent is arguing that, absent a duty to disclose material exculpatory information, prosecutors will attempt to induce defendants to plead guilty even when they possess evidence that definitively demonstrates that the defendant is innocent, that suggestion improperly presumes that prosecutors will act in bad faith. *United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995). "[T]radition and experience justify [the] belief that the great majority of prosecutors will be faithful to their duty." *Newton* v. *Rumery*, 480 U.S. 386, 397 (1987) (plurality opinion). Accordingly, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996).

To the extent that respondent is relying on the notion that there is something inherently illegitimate about a prosecutor's effort to induce a guilty defendant to plead guilty, this Court has rejected that suggestion. "[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Bordenkircher*, 434 U.S. at 364.

B. A Defendant May Enter An Intelligent And Voluntary Plea Without Obtaining Material Exculpatory Information From The Government

There is likewise no merit to respondent's contention (Br. 15-22) that receipt of material exculpatory information is necessary to ensure that a plea is intelligent and voluntary.

1. Knowledge of the potential weaknesses in the government's case is not a prerequisite for an intelligent and voluntary plea

In *Brady* v. *United States*, the Court expressly rejected the view that a guilty plea is not intelligent and voluntary unless the defendant has been made aware of the weaknesses in the government's case. "We find no requirement in the Constitution," the Court stated, "that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." 397 U.S. at 757. In *McMann* v. *Richardson*, 397 U.S. 759 (1970), the Court reiterated that same fundamental

point. The Court emphasized that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," and that "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case." *Id.* at 769.

Brady v. *United States* and *McMann* thus establish that defendants may not attack a plea as unintelligent or involuntary based solely on the ground that they "misjudged the strength of the Government's case." *Bousley* v. *United States*, 523 U.S. 614, 619 (1998). Respondent argues (Br. 26-28) that *Brady* v. *United States* and *McMann* do not foreclose the Ninth Circuit's holding that receipt of material exculpatory information is necessary to ensure that a plea is intelligent and voluntary. But respondent's argument in that regard fails to address the core statements from those decisions quoted above.

Relying on *Menna* v. *New York*, 423 U.S. 61, (1975) (per curiam), respondent argues (Br. 29) that *Brady* v. *United States*, and the cases applying it, do not foreclose claims that are "logically inconsistent with the valid establishment of factual guilt." Respondent then takes that concept one step further in order to claim that the failure to disclose material exculpatory evidence to a defendant contemplating a guilty plea is logically inconsistent with the valid establishment of factual guilt (Br. 29). But there is no inconsistency, logical or otherwise, between a defendant's sworn assertion that he has committed a crime and the existence of exculpatory evidence in the government's files that is material only in the sense that possessing such information "would create a reasonable probability the defendant *would reject the plea agreement*" and proceed to trial. Pet. App. 15a (emphasis added).

For example, a defendant might know that he has committed an offense, but also be likely to reject a plea agreement and put the government to its proof if the only evidence tying him directly to the offense comes from witnesses and the defendant learns that those witnesses have apparent biases that could be exposed on cross-examination. In that situation, however, the existence of such impeachment evidence would not undermine in any way the reliability of the defendant's sworn admission of guilt. Similarly, in this case, the possibility that the witnesses who apprehended respondent might somehow be impeached does not undercut the reliability of respondent's sworn assertion that she knowingly imported marijuana.

2. The failure to disclose material exculpatory information is not a form of misrepresentation

Respondent similarly errs in arguing (Br. 22-23) that a prosecutor's failure to disclose material exculpatory evidence to a defendant contemplating a guilty plea amounts to a "misrepresentation" that undermines the plea. Neither the government's securing of an indictment charging a defendant with a criminal offense nor the government's willingness to enter into a plea agreement carries with it a representation that the prosecution has no material exculpatory information in its files. Instead, those actions simply communicate the government's belief that the defendant committed the offense charged in the indictment, but that the government would prefer, for any number of quite legitimate reasons, to resolve that charge through a plea rather than through a trial.

Respondent interprets (Br. 23-24) language in Justice Blackmun's separate opinion in *Bagley*, and Justice Stevens' dissenting opinion in that same case as equat-

ing a failure to disclose material exculpatory information to a form of misrepresentation. A majority of the Court, however, did not subscribe to either of those opinions, and each of the statements cited was made in the context of material that would be useful in a trial.

Moreover, Justice Blackmun treated as a misrepresentation only one particular kind of *Brady* violation—"an incomplete response to a specific request," *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.), such as a request for any inducements made to witnesses, *id.* at 683. Similarly, Justice Stevens treated as a misrepresentation "silence in the face of a specific request." *Id.* at 714 (Stevens, J., dissenting). Those opinions do not suggest that non-disclosure of material exculpatory information would amount to a misrepresentation in any other context. In particular, they do not suggest that refusal by a prosecutor to supply *Brady* information in a plea context would amount to a misrepresentation. Still less do those opinions suggest that a failure to disclose exculpatory information could be characterized as a misrepresentation where, as here, the prosecution unequivocally advises the defendant that it does not intend to provide to the defense any evidence relating to the impeachment of government witnesses or a potential affirmative defense. J.A. 14. Any effort to equate non-disclosure in the context of such a statement to a misrepresentation would stretch the meaning of the word misrepresentation beyond recognition.

3. Hill v. Lockhart is inapposite

Respondent's extended reliance (Br. 15-22) on *Hill* v. *Lockhart*, 474 U.S. 52 (1985), is misplaced. *Hill* holds that counsel's deficiency in performance before entry of a guilty plea renders the plea invalid when there is a

reasonable probability that, but for counsel's error, the defendant would not have pleaded guilty, but would have gone to trial instead. As respondent notes (Br. 16), the Court in *Hill* gave as one example of a deficiency that might invalidate a plea an error in failing to investigate or discover potentially exculpatory evidence.

Hill is based on the specific command in the Sixth Amendment that a defendant is entitled to the assistance of counsel, a command that encompasses a right to assistance from counsel in making the strategic decision about whether to plead guilty or go to trial. *Hill*, 474 U.S. at 56-57. By virtue of the Sixth Amendment "an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion). No provision of the Constitution gives a defendant a corresponding right to assistance from the government in developing a tactical strategy with respect to pleading guilty where the defendant knows that he is, indeed, guilty.

Moreover, *Hill* did not purport to overrule the Court's holdings in *Brady* v. *United States* and *McMann* that a defendant does not need to know about the weaknesses of the government's case in order to make an intelligent and voluntary plea of guilty. Yet respondent's expansive reading of *Hill* would have precisely that effect.

Respondent's observation (Br. 17-18) that the Court has analogized the prejudice standard for a *Brady* violation to the prejudice standard for a Sixth Amendment violation has no relevance here. The crucial question in this case is not what standard should be used to assess

whether a prosecution's breach of a constitutional duty has prejudiced the defense. Rather, the question here is whether the prosecution has any constitutional duty in the first place. With respect to that antecedent question, the Court has never equated the prosecution's constitutional duties with those of defense counsel. Any such equation would radically alter the adversarial nature of the criminal justice system.

C. The Court Of Appeals' Disclosure Rule Would Impose Serious Costs On The Criminal Justice System

Respondent erroneously argues (Br. 36-42) that a disclosure rule will not impose serious costs on the criminal justice system. In fact, respondent's proposed rule would endanger government witnesses and ongoing investigations; transform *Brady* into an early discovery rule, requiring the rearrangement of prosecutorial resources and priorities; impose needless delays and burdens on the criminal justice system; intrude on the interest in finality of criminal convictions; and deter the government from offering plea bargains that would benefit both the defendant and the government.

1. Government witnesses and ongoing investigations would be placed in jeopardy

Federal criminal investigations very often target defendants, such as large-scale drug dealers and members of organized criminal enterprises, who pose a danger to persons who would testify against them. In those prosecutions, the government has a particularly compelling interest in protecting, for as long as possible, the identities of its witnesses. Under the court of appeals' disclosure rule, however, the government would have an obligation to disclose, long before trial, impeachment information that could reveal the identi-

ties of these witnesses. Such premature disclosure would jeopardize the safety of the witnesses. When the witnesses are informants or undercover agents involved in ongoing investigations, it would also force the government to bring investigations to an abrupt and premature end.

Respondent asserts (Br. 37) that the materiality standard adopted by the court below adequately protects the government's interests. But that standard requires the government to make the difficult predictive judgment of whether there is a "reasonable probability" that the information withheld would cause the defendant to reject the plea bargain. Under respondent's understanding of that standard (Br. 39), the government would have to disclose any "significant" impeachment information about any "significant" government witness. And respondent also advises (Br. 41) that, if the government has difficulty applying that standard, it should "err on the side of disclosure." Application of those principles would potentially place numerous ongoing investigations and witnesses at risk.

2. Defendants would be able to use Brady as a discovery and trial preparation device imposing their timetable on the government's trial preparation strategy and resources

The court of appeals' disclosure rule would also advance the time for disclosure of material exculpatory information, permitting criminal defendants to use *Brady* as a discovery device to assist trial preparation. Respondent's assertion (Br. 38) that the court of appeals' rule would not advance the time for disclosure is incorrect. Under existing law, the prosecutor must disclose material exculpatory information in time for its effective use at trial. Gov't Br. 28-29. Under the court

of appeals' rule, the prosecutor must disclose such information before entry of a guilty plea. Thus, under the court of appeals' rule, a criminal defendant need only say that he is contemplating pleading guilty in order to trigger the prosecutor's disclosure obligation. The defendant would then be free to use the information that he obtains to assist his trial preparation, effectively transforming *Brady* from a fair trial right into an early discovery and trial preparation device.

3. The government would be required to engage in burdensome trial preparation

Respondent contends (Br. 38-39) that compliance with the court of appeals' rule would not impose an undue burden on the government. But compliance with that rule would require a significant commitment of additional resources to cases that are now resolved routinely. In many cases, the government does not even begin trial preparation until it is clear that a case is going to go to trial. In that way, the government can devote its limited prosecutorial resources to the cases where they are needed most.

Under the court of appeals' rule, the government would have to undertake significant trial preparation just to secure a guilty plea. The government would have to determine who its witnesses are most likely to be; it would have to search the files of all members of the prosecution team to determine whether there is any significant impeachment material relating to those witnesses; and it would have to assess whether the material it uncovers, either individually or collectively, would be reasonably likely to lead the defendant to reject a plea and go to trial. That burden is substantial, and removes a substantial component of the value to the government of plea bargaining.

4. Criminal defendants would have a new basis for seeking to overturn final convictions

The court of appeals' rule also invites any defendant who pleads guilty and is later dissatisfied with his sentence to raise a claim that the government did not turn over some piece of information that would have led him to go to trial rather than plead guilty. Respondent argues (Br. 39) that the court of appeals' materiality standard adequately vindicates the interest in the finality of criminal convictions. But that standard does not require the defendant to show that he is actually innocent or even that the undisclosed information casts doubt on the reliability of the guilty verdict based on his plea. Instead, it simply requires the defendant to show that there is a reasonable likelihood that the information would have led him to have taken his chances at trial rather than pleading guilty. See Resp. Br. 17; Pet. App. 15a. Showing that such a tactical choice might have been made, *at that stage*, does not provide a sufficient justification for reopening a final *conviction* of a guilty defendant.

Respondent also ignores the significant costs associated with litigating such claims. Approximately 95% of federal criminal convictions are obtained by guilty plea. Gov't Br. 24. Recognizing a new ground for challenging them puts new burdens on courts that are already overworked and "inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979).

5. The government would be deterred from negotiating plea agreements that would benefit criminal defendants

If the government must disclose material exculpatory information to a criminal defendant before he

pleads guilty, it would be deterred from offering a plea bargain any time that such disclosure might endanger a witness or compromise an ongoing investigation. Moreover, if the government must essentially complete its trial preparation in order to comply with its disclosure obligations, it would have far less incentive to offer a defendant a plea. Thus, while the court of appeals' disclosure rule is intended to benefit criminal defendants, it would have the perverse effect of depriving a significant number of criminal defendants of the opportunity to obtain advantageous plea agreements.

Respondent contends (Br. 40) that there is a cost to failing to disclose material exculpatory information: Some criminal defendants may be less likely to enter into a plea agreement if the government does not agree to disclose such information. But nothing in current law prevents the government from accommodating such a defendant when it concludes that such disclosure would be in the government's interest. The problem with the Ninth Circuit's rule is that it requires the government to disclose such information as a condition for obtaining a plea, even if disclosure would endanger government witnesses, compromise ongoing investigations, or otherwise subvert the government's interests.

D. A Criminal Defendant May Waive In A Plea Agreement Any Right He May Have To Obtain Material Exculpatory Information Before Pleading Guilty

Finally, respondent errs in contending (Br. 42-47) that a criminal defendant may not waive in a plea agreement access to material exculpatory information. Even if the Court were to find that a defendant has a right to receive such information before pleading guilty, that right, like virtually all other rights, would be subject to waiver. *Mezzanatto*, 513 U.S. at 201.

Respondent contends that the right to receive material exculpatory information before pleading guilty may not be waived because it is "so fundamental to the reliability of the factfinding process." Br. 43 (quoting *Mezzanatto*, 513 U.S. at 204). But as previously discussed, the existence of some exculpatory information in the government's possession does not affect the reliability of a counseled defendant's sworn assertion that he committed the offense.

Respondent also errs in contending (Br. 45-46) that a constitutional protection may not be waived if it adds to the reliability of a guilty verdict. The right to counsel, the right to cross-examine witnesses, and the right to trial itself all enhance the reliability of a guilty verdict. Yet those fundamental constitutional protections may be waived. *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938); *Boykin* v. *Alabama*, 395 U.S. 238, 245 (1969). If a guilty defendant may constitutionally waive his Sixth Amendment right to a trial, he may surely waive any constitutional right he may have to information that might help him make the tactical decision whether to exercise that waiver.

Nor does it matter whether respondent's proposed new constitutional right is "rooted in the public interest." Resp. Br. 44. As this Court explained in *New York* v. *Hill*, 528 U.S. 110, 117 (2000), "[i]t is *not* true that any private right that also benefits society cannot be waived." To the contrary, "[i]n general '[i]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation.'" *Ibid.* Accordingly, the Court has "allow[ed] waiver of numerous constitutional protections for criminal defendants that also serve broader social interests." *Ibid.* (citing cases holding

that the right to counsel and the right to a jury trial may be waived).

There is no reason for a different outcome here. If a counseled defendant voluntarily chooses to forgo access to exculpatory information in the government's files in order to obtain the benefits of a plea, there is no constitutional basis for precluding him from doing so.

* * * * *

For the foregoing reasons, as well as those set forth in the opening brief, the judgment of the court of appeals should be reversed.

THEODORE B. OLSON
Solicitor General

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In The Supreme Court Of The United States

UNITED STATES,

Petitioner,

v.

ANGELA RUIZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF OHIO AND 19 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This amicus brief addresses the following question:

Whether before pleading guilty, a criminal defendant has a constitutional right to obtain exculpatory information, including impeachment material, from the government.

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INTEREST OF THE *AMICI* STATES

States, like the federal government, rely heavily on guilty pleas in their criminal justice systems. More than 94% of all state criminal convictions are obtained through guilty pleas—a proportion that mirrors the federal rate. *See* Matthew R. Durose, *et al.*, *Felony Sentences in State Courts, 1998*, Bureau of Justice Statistics Bulletin 8 (Oct. 2001). Any decision by this Court regarding the prosecution's disclosure obligations before entering a plea agreement or accepting a guilty plea will, therefore, affect the operation of the criminal justice systems of all the States. Should this Court adopt the disclosure rule created by the Ninth Circuit, guilty defendants would be discouraged from pleading guilty, the privacy and safety of victims and other witnesses would be threatened, the plea process would be delayed in even the most routine cases, and the workload of prosecutors would markedly increase. Because the Constitution does not mandate that result, the amici States urge this Court to reverse the judgment of the Ninth Circuit.

SUMMARY OF ARGUMENT

The holding of the court of appeals, which gives a criminal defendant an unwaivable right to prosecutorial disclosure of relevant exculpatory and impeachment evidence prior to the acceptance of a guilty plea, is unsupported by the Due Process Clause and this Court's precedent. The principles of due process require that a guilty plea be voluntary and intelligent. The concept of "voluntary and intelligent," however, has never included a requirement that the defendant know of potential weaknesses in the prosecution case so that the defendant can more accurately weigh the risks and benefits of going to trial.

The holding of the court of appeals is also inconsistent with the due process principles promoted by

Brady v. Maryland, 373 U.S. 83 (1963). The rule set forth in *Brady v. Maryland* and its progeny advances the search for truth by helping to ensure fair trials. Where a defendant waives the right to a trial, the defendant necessarily also waives the subsidiary right to receive exculpatory and impeachment evidence from the prosecutor. Nor would any more general interest in fundamental fairness be furthered by the Ninth Circuit's rule. Neither the defendant nor defense counsel needs to know what exculpatory or impeachment evidence the prosecution possesses in order to know if the defendant is guilty. Rather, the only potential benefit to the defense is that pre-plea disclosure allows the defense to capitalize on a perceived weakness in the prosecution's case, such as the testimony of a vulnerable victim or witness. In addition, adequate due process safeguards already exist to ensure a fair plea process.

Lastly, the court of appeals rule creates new practical problems that would significantly harm the criminal justice system. The rule threatens the safety and privacy interests of victims and prospective witnesses for the prosecution. The effect of the rule would be most burdensome in cases involving vulnerable victims, where the defendant can use the victim's vulnerability to his advantage. The duties of prosecutors will be greatly increased if they are required to conduct trial preparation tasks, even in cases where there will be no trial. And the rule would cause considerable delay in the resolution of cases, even where the defendant willingly admits guilt and seeks a prompt resolution.

ARGUMENT

The Ninth Circuit Decision Is Unsupported By The Constitution Or Supreme Court Precedent And Is Detrimental To The Search For Truth, The Interests Of Victims And Witnesses, And The Effective Operation Of The Criminal Justice System.

A. The Requirement That A Plea Be "Voluntary And Intelligent" Does Not Mean That The Defendant Must Have Knowledge Of Exculpatory And Impeachment Evidence In The Possession Of The Prosecution.

1. The principles of due process require that for a guilty plea to be constitutionally valid, it must be a voluntary and intelligent act. *Brady v. United States*, 397 U.S. 742, 748 (1970). In *Brady v. United States*, this Court provided the standard for the voluntariness requirement:

> "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or even his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (*e.g.*, bribes)."

397 U.S. at 755 (quoting *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957)).

As to the "intelligent" requirement, this Court has long held that the defendant must receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). A defendant must also have a "full understanding of what the plea connotes and of its consequence," including the nature of the charges, the defendant's right to a jury trial, the acts sufficient to constitute the offenses for which the defendant is charged, and the permissible range of sentences. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). A defendant's competence and the availability of counsel tend to corroborate that the plea was intelligently made. *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973); *Brady v. United States*, 397 U.S. at 756, 758.

Neither in this case, Pet. App. 9a-10a, nor in *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995), did the court of appeals suggest that the prosecution possessed factual information that the defendant had to know to understand the charges or to determine whether or not the defendant was, in fact, guilty as charged. Rather, the court reasoned that disclosure was necessary merely to help the defense appraise the strength of the prosecution's case before deciding whether or not to plead guilty. Pet. App. 9a-10a; *Sanchez*, 50 F.3d at 1453. That disclosure obligation is a creation of the Ninth Circuit. As shown above, this Court has never held that for a guilty plea to be "voluntary and intelligent," the defendant has to know what evidence the prosecution possesses or the potential weaknesses of the prosecution's case.

2. It may be true, as the court of appeals observed (Pet. App. 9a-10a), that a defendant's decision whether or not to plead guilty is often influenced by an appraisal of the prosecution's case. But it does not follow that a plea made without this information is constitutionally defective.

Indeed, this Court's opinions suggest just the contrary. In *Brady v. United States*, this Court declared that a defendant was not entitled to withdraw his plea of guilt "merely because [the defendant] discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case." 397 U.S. at 757.

Likewise, in *McMann v. Richardson*, 397 U.S. 759, 771 (1970), this Court held that a defendant's plea of guilty based on reasonably competent advice of counsel is an intelligent plea not open to attack on the ground that defense counsel may have misjudged the admissibility of evidence. In *McMann*, the defendants sought to withdraw their guilty pleas, which they claimed were based on confessions that were unlawfully obtained. *Id.* at 761-65. This Court characterized the claim by each defendant as a claim that the admissibility of the confession was mistakenly assessed and that, because the defendant was erroneously advised, his plea was an unintelligent and voidable act. *Id.* at 769. The Court rejected this claim, stating that the Constitution "does not render pleas of guilty so vulnerable." *Id.* Elaborating, the Court stated:

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. . . . Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

Id. at 769-70 (citing *Brady v. United States*, 397 U.S. at 756-57). The Court added that by pleading guilty, a defendant assumes the risk of ordinary error in either the defendant's or defense counsel's assessment of the law and the facts. *Id.* at 774; *see also Parker v. North Carolina*, 397 U.S. 790, 797-98 (1970). In other words, this Court has rejected the suggestion that for a plea to be knowing and intelligent, a counseled defendant must be able to assess accurately the strength or weakness of the case against him. Due process does not require such an expansive definition of those terms.[1]

B. The *Brady* Rule Exists To Assist The Court And Jury In The Search For The Truth, Thus Ensuring A Fair Trial—Interests Not Implicated Once A Defendant Waives The Right To A Trial.

1. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." This rule applies not only to evidence in the prosecutor's own files, but also to evidence in the possession

[1] The American Bar Association Standards for Criminal Justice confirm that the Ninth Circuit rule diverges from the conventional understanding of what constitutes a "voluntary and intelligent" plea. These Standards include a chapter, Pleas of Guilty, which details what information the court should provide to the defendant before accepting a guilty plea and the standards for determining the voluntariness of the plea. Standards for Criminal Justice, §§14-1.4; 14-1.5 (ABA 1997). Nowhere do the Standards suggest that a plea is only "voluntary and intelligent" if the defendant knows about exculpatory or impeachment evidence before pleading guilty.

of others acting on behalf of the prosecution, including police officers and other prosecutors. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). The Court has expanded the rule of *Brady* to require the disclosure of such evidence even when the defense has not requested it, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and to include the disclosure of impeachment evidence, so long as the evidence is material to either guilt or punishment, *United States v. Bagley*, 473 U.S. 667, 676-77 (1985); *United States v. Giglio*, 405 U.S. 150, 154 (1972).

In *Bagley*, this Court found the formulation of the materiality test stated in *Strickland v. Washington*, 466 U.S. 668 (1984), to be the appropriate test for all cases involving alleged *Brady* violations. Evidence is "material" under the *Brady* analysis "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. In particular, "'[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Strickland*, 466 U.S. at 695).

The object of the *Brady* rule is to ensure that a defendant receives due process at trial, *i.e.*, a fair trial that results in a reliable verdict. *See Brady*, 373 U.S. at 83 ("Society wins not only when the guilty are convicted but when criminal trials are fair"); *Kyles*, 514 U.S. at 440 (discussing how disclosure by the prosecutor preserves the criminal trial "as the chosen forum for ascertaining the truth about criminal accusations"). Thus, the *Brady* line of cases, "together with earlier cases condemning the knowing use of perjured testimony, illustrate[s] the special role played by the American prosecutor in the search for truth *in criminal trials*." *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (emphasis added).

This Court has never applied the *Brady* rule outside of the context of a criminal trial and sentencing. Indeed, in *United States v. Agurs*, the Court stated that the *Brady* rule "arguably applies in three quite different situations. Each involves the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103 (emphasis added). None of the post-*Agurs* cases has expanded the reach of *Brady* to convictions resulting from guilty pleas. *See, e.g., Strickler*, 527 U.S. 263; *Kyles*, 514 U.S. 419.

Moreover, the *Brady* rule has never been intended as a rule of broad discovery, one that would alter the adversarial nature of the American criminal justice process. *See Bagley*, 473 U.S. at 675 ("Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."); *Agurs*, 427 U.S. at 109 ("Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much."). For this reason, the prosecutor is not required to deliver the entire prosecution file to defense counsel. *Bagley*, 473 U.S. at 675. Rather, the prosecutor must only disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *Id.*

2. Given the principles underlying the *Brady* rule, it is neither appropriate, logical, nor desirable to extend the rule to cases where the defendant has waived his right to trial and pleaded guilty. Where a criminal defendant willingly admits guilt and waives his right to a trial, he necessarily also waives the subsidiary rights that help ensure that he receives a fair trial. "The *Brady* rule's focus on protecting the integrity of trial suggests that where no trial is to occur, there may be no constitutional violation." *Matthew v. Johnson*, 201 F.3d 353, 361 (5th Cir. 2000) (declining to recognize a claim of a *Brady* violation where defendant pleaded guilty). As the

Fifth Circuit reasoned, by waiving the right to trial a defendant

> eliminates the opportunity for a prosecutor to "contrive a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury." Instead, conviction is supported by the defendant's plea.

Id. at 362 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (internal punctuation and citation omitted)). There is simply no logic in the Ninth Circuit's holding that one can give up the right to trial but not the subsidiary right to the disclosure of *Brady* material. If the defendant pleads guilty, no judge or jury will reach a verdict based on a skewed version of the facts. No witnesses will testify against the defendant, so nothing prompts the need for impeachment evidence.

Moreover, expanding the *Brady* rule to the plea bargaining process would not promote its basic objective, the search for the truth. The pre-plea disclosure of exculpatory or impeachment evidence does not help a defendant determine the truthfulness of the charges against him. A competent defendant knows whether the allegations are true, even without knowledge of the prosecution's exculpatory or impeachment evidence. As to a guilty defendant, all pre-plea disclosure of exculpatory or impeachment evidence would do is provide him with a strategic advantage during the plea agreement process. Disclosure of evidence that is detrimental to the prosecution may enhance his bargaining position, prompting him to demand better terms for the plea agreement before agreeing to plead guilty. Alternatively, the defendant may change his mind about pleading guilty, and

may instead elect to go to trial. Neither outcome betters the criminal justice system.

And innocent defendants do not need exculpatory or impeachment evidence from the prosecutor to inform them of their innocence. This Court has recognized that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Exculpatory and impeachment evidence surely becomes important at the time of trial to defendants who may have been wrongly accused. But such evidence is not necessary to ensure a constitutionally-mandated level of fairness during the plea process.

C. Existing Safeguards Sufficiently Protect Defendants During The Plea Process.

The creation of an unwaivable right to pre-plea disclosure of exculpatory and impeachment evidence is not necessary to ensure fundamental fairness in the plea process. As discussed in Section A above, a court may accept a guilty plea only where the plea is voluntary and intelligent, where the defendant has had the opportunity to be represented by counsel, and where the defendant is competent. *See Brady v. United States*, 397 U.S. at 755-56. Other safeguards also help ensure that the plea process comports with due process.

Prosecutors are obligated to seek justice. A prosecutor "is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'" *Agurs*, 427 U.S. at 110-11 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Concomitant with that obligation, a prosecutor who has evidence that exonerates a defendant is obligated not to pursue the conviction of that person. To be

clear, though, evidence that exonerates the defendant is not merely evidence that might give a guilty defendant some hope of a acquittal in a trial; rather, it is evidence that definitively demonstrates the defendant's actual innocence.

Further, this Court has long made clear that prosecutors may not intentionally mislead or deceive a defendant in order to obtain a guilty plea. *See, e.g., Walker v. Johnston*, 312 U.S. 275, 286 (1941) ("if [the defendant] was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right"). Should a plea agreement be the product of fraud or coercion, it may be found to be involuntary and nullified by the court. *Brady v. United States*, 397 U.S. at 755; *see also United States v. Mezzanatto*, 513 U.S. 196, 209-210 (1995) (stating that the appropriate response to concerns about abuse by prosecutors is to permit case-by-case inquiries into whether plea waiver agreements are the product of fraud or coercion).[2] Accordingly, the ABA Standards for Criminal Justice provide that neither defense counsel nor the prosecutor should make false statements concerning the evidence in the course of plea discussions with opposing counsel. Standards for Criminal Justice, §§4-6.2; 14-3.1(f) (ABA 1997).

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[2] The Court also noted that "the great majority of prosecutors will be faithful to their duty" and rejected the defendant's suggestion that waiver agreements should be void because they purportedly "invite prosecutorial overreaching and abuse." *Id.*

D. A Rule Requiring Pre-Plea Disclosure Of Exculpatory And Impeachment Evidence Would Pose Numerous Practical Problems.

1. Not only does the rule created by the Ninth Circuit fail to promote the search for truth or secure fundamental fairness in the plea process, it generates new problems that would significantly harm the justice system. First, early disclosure may infringe on the privacy and safety of victims and other witnesses for the prosecution. The Ninth Circuit rule compels the prosecutor to disclose potential impeachment evidence about prospective prosecution witnesses even though there will be no trial. This impeachment evidence may include mental health records, medical records, school records, and records of criminal conviction. *Cf. Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) (a criminal defendant may be entitled to *in camera* review and disclosure of otherwise confidential documents pertaining to prosecution witnesses).

In some prosecutions, an even greater concern would be raised. In many cases, a victim's or witness's safety or well-being would be jeopardized if the prosecutor were required, upon the demand of the defense and in the absence of a trial, to disclose information about the person's intent to testify. This would most often be true in cases where the defendant is in a position to intimidate the victim or witness directly or indirectly (*e.g.*, gang-related crimes, cases involving family violence, and cases of child sexual abuse). In such cases, the defendant may use this information to intimidate or otherwise pressure the victim or witness not to testify.

Under the current system, a prosecutor can protect vulnerable victims and witnesses by entering a plea agreement, which eliminates the need to disclose the information. Alternatively, the prosecutor may reduce the

opportunity for victim intimidation by delaying the disclosure of the information until closer to the trial date (to the extent permitted by discovery statutes and court orders). In contrast, under the Ninth Circuit rule, the prosecutor is left with no opportunity to protect vulnerable victims or witnesses because the prosecutor would be required to disclose this information in the absence of trial and upon the demand of the defense. Little is gained and much is lost by such a result.

Moreover, the imposition of these burdens on victims and witnesses would likely reduce the accuracy of the proceedings. If a defendant is willing to plead guilty, but then changes his mind only because of the disclosure of impeachment evidence about the victim or witness, the decision probably has little to do with the defendant's actual innocence and a great deal to do with the perceived vulnerability of the witness. Consider, for example, an accused rapist who is willing to plead guilty, but then changes his mind when he learns that the victim has a history of mental illness. His decision to plead not guilty would likely be due to his (or his attorney's) belief that the victim's history of mental illness can be used to create doubts in the jurors' minds about the victim's credibility, and not because the defendant suddenly realizes he did not commit the offense. Similar concerns are likewise raised in cases involving child sexual abuse, elder abuse, or family violence.

Making a bad situation still worse, defendants who learn from the prosecutor that their victims or key witnesses are vulnerable will be more likely to proceed to trial irrespective of their guilt. As a result, under the Ninth Circuit rule, the most vulnerable victims would be called to testify more often than they would be under the present system.

Finally, subjecting a victim to the release of highly personal information greatly reduces the victim's benefit from the plea agreement. Prosecutors frequently consider the benefits to victims provided by a plea agreement, such as avoiding the need to testify at trial and avoiding the release of personal information about the victim. If these prosecution-side benefits are significantly reduced, it is likely that the prosecutor would consequently reduce defense-side benefits. As such, neither party would be as satisfied with the agreement as he or she might have been in the absence of the Ninth Circuit rule.

2. Another negative consequence of the Ninth Circuit rule is that it would require prosecutors in every guilty plea case to conduct trial preparation tasks that are normally not undertaken until the prosecutor is fairly certain there will be a trial. These tasks would include identifying possible prosecution witnesses, checking all prosecution and police files to determine whether there is any exculpatory or impeachment evidence, and then determining whether that evidence is "material" and thus must be disclosed. *See* Pet. App. 12a-13a; 38a-39a (Tallman, J., dissenting).

Although this rule may create little burden if the plea is taken on the eve of trial, it creates a significant and illogical burden if the plea is offered early in the process. Any determination of potential evidence and the materiality of that evidence in the context of a guilty plea must be speculative. As the Sixth Circuit observed, "any number of events might . . . intervene[]" between plea negotiation and trial. *Campbell v. Marshall*, 769 F.2d 314, 324 (6th Cir. 1985). "Favorable or unfavorable rulings on the evidence might have been rendered; witnesses favorable to the defense or to the prosecution might have died awaiting trial or have become otherwise unavailable. New witnesses might have come forward; known witnesses might have recanted." *Id.* And the earlier in the process the defendant chooses to plead

guilty, the more difficult and surreal these tasks will be for the prosecutor.

For instance, if a defendant readily admits his guilt and seeks to plead guilty shortly after being charged, the police might not have conducted a full investigation of the offense. There may be witnesses who have not been interviewed, and about whom the prosecution knows little. Even so, the Ninth Circuit rule would require the prosecutor to speculate as to who might have been called as a witness, then check prosecution and police files for potential impeachment evidence about the individuals. Indeed, the Ninth Circuit rule might even require the prosecutor to determine and disclose whether these potential witnesses would be hesitant or unwilling to testify at trial. And a prudent prosecutor seeking to ensure the finality of convictions based on guilty pleas would be advised to disclose not only evidence that the prosecutor personally believes meets the materiality standard of *Brady*, but to disclose any evidence that a court, reviewing a claim, might possibly determine is "material."

3. Finally, as a consequence of these additional burdens on prosecutors, a requirement for pre-plea disclosure delays the resolution of cases. Such delays would frustrate one of the core benefits of plea agreements—conserving "scarce judicial and prosecutorial resources." *Brady v. United States*, 397 U.S. at 752. The delays would also harm crime victims, who must wait longer to see their offenders brought to justice. And the delays would even harm many defendants.

In *Corbitt v. New Jersey*, 439 U.S. 212, 223 (1978), this Court recognized that one benefit a defendant obtains from a guilty plea is avoiding extended pre-trial incarceration and gaining a speedy disposition of his case. The Ninth Circuit rule would undermine this benefit. For example, in

cases where the defendant has been arrested and is being held in custody (*e.g.*, because he cannot post bond or because he is on a probation hold), the defendant may remain in custody while the prosecutor completes the necessary tasks. If the defendant is sentenced to a term of probation or time served, any delay in the time it takes for the prosecutor to conduct these tasks will be additional time in custody that the defendant would not otherwise have had to serve.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors.[1] Two of NACDL's chief objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. Because the Government of the United States is taking the position that the Ninth Circuit's decision in *United States v. Ruiz* should be overturned – a decision that bears in part on the meaning of this Court's decision in *Brady v. Maryland*, 373 U.S. 83; 83 S.Ct. 1194 (1963) – NACDL respectfully submits this brief as an amicus curiae in support of Respondent Ruiz and the Ninth Circuit's decision.

California Attorneys for Criminal Justice ("CACJ"), an NACDL affiliate, is the largest organization of criminal defense lawyers in California. Its membership includes both public defenders and privately employed criminal defense lawyers. In the past twenty-five years, CACJ has appeared as *amicus curiae* in this Court and in other courts throughout the United States in cases important to the administration of justice. CACJ expressed its interest in the issues currently under review in this Court by appearing in the Northern District of California in one of the first cases in which a so-called "*Brady* waiver" had

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1. Letters of consent have been filed with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or part and no person or entity, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

been negotiated by the Office of the United States Attorney for the Northern District of California. In addition, members of CACJ, in their role as lawyers defending cases in the federal and state courts in California, have repeatedly urged respect for the *Brady* rules.

SUMMARY OF ARGUMENT

The Government has argued below, and now again before this Court, that a prosecutor's obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), to disclose exculpatory evidence to an accused who elects to go to trial does not apply when an accused elects to plead guilty. The Government takes the position, in the alternative, that if *Brady* does apply in a case involving a guilty plea, then the accused who pleads guilty can waive the right to disclosure of *Brady* materials and thereby disencumber the prosecutor of any *Brady* obligation. *Amici* contend that either of the Government's alternative positions, if adopted by this Court, would significantly obstruct the truth-finding and justice-dispensing functions of our courts, permit prosecutors to act in ways directly contrary to their charge to see that justice is done, and thereby serve to undermine the public's confidence in the operation of our criminal justice system.

Amici are criminal defense lawyers engaged day-to-day in battles with prosecutors. In defending the criminally accused, *amici* play a key role in an adversarial justice system designed to achieve just results by a carefully regulated clash of opposing parties before an impartial judicial officer. The legitimacy of this system stands or falls on the implementation of and compliance with rules and principles that optimize the probability of

fair and accurate adjudications and sentences.

Amici contend that the rule of *Brady*, as correctly interpreted by the United States Courts of Appeals for the Second and Ninth Circuits to apply to guilty plea as well as trial cases, is critical to maintaining the legitimacy of our criminal courts in two ways. First, by deterring prosecutorial withholding of exculpatory evidence, the rule serves to minimize the number of wrongful convictions or sentences. Second, the rule affords appellate courts both the opportunity and ability to redress wrongful convictions and sentences.

Amici will not reiterate the points Respondent Ruiz will ably place before this Court in support of maintaining the *Brady* rule's proper scope and force. Rather, *amici* seek to direct this Court to the practical side of this dispute – the significance of the *Brady* rule within the framework of an adversarial system where there is room for abuse by litigators competing to win. Cases that have reviewed *Brady*-related issues provide compelling evidence that any contraction or dilution of the *Brady* rule will diminish not only the integrity of our criminal justice system but also its legitimacy.

The provenance and context of the *Brady* rule is the guarantee to an accused of a just process, in which the the Government has a non-deligable duty to see that justice is done. Even before *Brady*, in *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340 (1935), noting that an adjudication of guilt at trial is dependent on the presentation of truth, the Court held that where the prosecution knowingly contrives a conviction through deception, the conviction, and the resulting punishment, are "inconsistent with the rudimentary demands of

justice. . ." In *Brady*, the Court stated that in our system the prosecutor plays "the role of an architect of a proceeding" - and where that architect fails to disclose information that bears on the truth of the matter, he or she contributes to an adjudication that "does not comport with standards of justice . . .." *Brady*, 373 U.S. at 88, 83 S.Ct. at 1197. Because the prosecutor is a representative of a sovereignty, and because the ultimate objective of the sovereign is to see that justice is done, the prosecutor must seek that ultimate objective. *United States v. Bagley*, 473 U.S. 667, 676 n.6, 105 S.Ct. 3375 (1985).

From this Court's first definition of the *Brady* rule as a constitutional obligation of prosecutors and an inherent or structural component of due process, this Court has held that the obligation exists throughout the life of a case, applying not only to adjudication of guilt but also to sentencing, and into the post-conviction litigation. Indeed, the issue in *Brady* itself was the prosecutor's duty with respect to exculpatory evidence material to the sentencing of the defendant. Yet in this case, the Government contends that there is a point at which the prosecutor's obligation to provide evidence that "would tend to exculpate [the accused] or reduce the penalty" lapses. According to the Government, that point is reached in one of two ways: first, if the accused elects to plead guilty rather than go to trial, the obligation is extinguished by operation of law; or, if the accused pleads guilty and in doing so waives his or her right to *Brady* materials, the obligation dissolves by contractual agreement. Under either alternative, the Government's position, if adopted, would subvert the criminal court's truth-finding function in adjudicating guilt and the court's justice-dispensing function with regard to fact-finding and fact-based sentencing after conviction.

In an accusatorial system such as ours, the prosecutor's obligation of disclosure is a fundamental, structural component of the administration of criminal justice. The courts have to trust that the executive will discharge its obligation of disclosure to ensure the integrity of the proceedings, and, where material omissions occur, use the *Brady* rule to repair the damage in appellate proceedings designed for just that purpose.

ARGUMENT

I. The Prosecutor's Obligations of *Brady* Disclosure Are Central to the Integrity of Our Adversarial Process; Without Them, a Major Safeguard of Our Justice System's Integrity Falls by the Wayside.

Our legal tradition has deep roots. Important aspects of our common law tradition "emerged in the first century and a half following the Norman Conquest."[2] One of the differences between the so-called inquisitorial model rooted in the post-Napoleonic era French system and our adversarial form of adjudication is that in our system courts are not involved in supervising and conducting the investigative phase of the process.[3] Here, the police, and prosecution, investigate and the prosecutor then initiates the criminal case charging process. Thus, until adjudication, our courts do not know what evidence has been disclosed during the

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2. H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 220 (Oxford University Press, 2000).

3. Henry J. Abraham, *The Judicial Process* 98-100 (Oxford University Press, 6th ed. 1993).

investigation. It is the prosecutor who possesses the fruit of his investigation, sharing it largely at his discretion (but subject to the *Brady* rule), and then, in the cauldron of adversarial trials, participates in the adjudication of the facts. Counsel for the accused also investigates when the adjudicative process begins, though often with significant limitations caused by the asymmetry of our process. This asymmetry exists because, with few exceptions, the prosecutor already has investigated and built up a case at least to the level of probable cause before defense counsel becomes involved. Given this imbalance between adversaries, and the overriding goals that the truth emerges and justice is done, the prosecutor is expected to reveal information to defense counsel that, if used competently, may make a significant difference either in the adjudication of guilt or in the facts related to sentencing decisions.

Since this Court's decision on *Mooney v. Holohan*, supra, the rule has been that where the prosecution knowingly uses perjured testimony, such a "contrivance by a state to procure the conviction" is inconsistent with justice. 294 U.S. at 112-13. Courts have therefore assumed that, "if it is established that the government knowingly permitted the introduction of false testimony 'reversal is virtually automatic.'" *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (quoting *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975)).

In a series of cases prior to *Brady* involving either perjured testimony, or prosecutorial suppression of evidence that would have demonstrated the falsity of trial testimony, this Court sought to maintain the integrity of the process. For example, in *Alcorta v. Texas*, 355 U.S. 28, 31, 78 S.Ct. 103 (1957), a prosecutor instructed

a witness to withhold evidence about his relationship with the decedent, resulting in a mistaken impression about the nature of the accused's participation in the charged crime. This instruction was deemed significant to the integrity of the proceeding, and the acceptability of the result. Similarly, in *Pyle v. Kansas*, 317 U.S. 213, 215-16, 63 S.Ct. 177 (1942), this Court held that a habeas petitioner is entitled to freedom when his imprisonment was obtained through the State's knowing use of perjured testimony.

After *Brady*, in *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392 (1976), this Court observed that it had "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

In *Nix v. Whiteside*, 475 U.S. 157, 168-69, 106 S.Ct. 988 (1986), this Court declared that a lawyer who presents perjury on behalf of a defendant commits an illegal act. The *Nix* Court noted that the Canons of Professional Ethics of the American Bar Association and the Model Code of Professional Responsibility impose on all lawyers the duty to prevent and disclose frauds. More recently, with respect to prosecutors, the Ninth Circuit put the point succinctly: "A prosecutor has a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials." *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000).

Recently, a prosecutor put before the jury the testimony of an accomplice against the accused without disclosing to the defense the existence of a letter

implicating the accomplice and others in a plot to frame the accused. *Commonwealth of the Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1111-14 (9th Cir. 2001). The reviewing court concluded that the Government's failure to discover the origin of the letter aided in the commission of a fraud on the trial process. Reflecting on the realities of our criminal court system, the Ninth Circuit noted that "each contract for testimony [by a Government witness] is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to 'get' a target of sufficient interest to induce concessions from the government." Id. at 1124. In reversing the conviction, the court noted that recent studies had demonstrated that in approximately one out of five cases involving DNA-exonerated defendants, the defendants had been inculpated by an accomplice's or informant's testimony. Id. at 1124 n. 6.[4] Thus, there is a lengthy history of judicial intolerance for governmental tinkering with the integrity of the process through the introduction of false, contrived, or misleading evidence.

When prosecutors do not disclose such information, they compromise the integrity of the proceedings: the fact-finding process at trial and at sentencing, and review by a higher court. Regrettably, there are times when an individual prosecutor may forget or ignore "the ethics of his office" and fail to disclose *Brady* information. *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976). There are also times when a prosecutor will seek to win a case by intentionally hiding material impeachment evidence from defense counsel.

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4. The court referred in passing to the now well-known book *Actual Innocence* by Barry Scheck, Peter Neufeld, and Jim Dwyer.

For example, in *Campbell v. Reed*, 594 F.2d 4 (4th Cir. 1979), by intentionally concealing impeaching evidence as described in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972), the prosecutor negotiated a deal with the accomplice's attorney that was kept secret from the accomplice. In exchange for testimony, the accomplice would receive a reduced prison term. At the prosecutor's behest, the accomplice's attorney did not reveal the terms of the deal but merely assured his client that if he testified, "everything would be all right" and that "there were things going on that it would be better for him not to know." Id. at 6. Thus, when the accomplice was cross-examined as to any benefits he received or was promised for his testimony, he denied any such deal and stated that he was just doing his "civic duty." Id. The Fourth Circuit granted Campbell's habeas petition, holding that the prosecutor's failure to correct the accomplice's unwittingly false testimony violated due process. Id. at 7.

Sadly, such prosecutorial misconduct continues despite appellate court decisions such as *Campbell*. In *Singh v. Prunty*, 142 F.3d 1157 (9th Cir. 1998), for example, the prosecutor kept from the defense information regarding benefits conferred on its major witness. In *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), the Ninth Circuit reversed a conviction because the Assistant United States Attorney concealed *Brady* information and a cooperation agreement with a material witness-informant, and continued the scheme on appeal.

Prosecutors will no doubt contend that what distinguishes guilty pleas from trial convictions with regard to the *Brady* rule is that a guilty plea is an

absolutely reliable guarantee that the guilt adjudication is correct. Not so. Some accuseds who are completely innocent of crimes (or at least innocent of the charges against them) nevertheless plead guilty for any number of reasons.

Amici have reviewed two recent cases which serve to demonstrate the pitfalls of adjudications arrived at through guilty plea. In 1992, John Dixon pled guilty to first degree kidnapping; first degree robbery; two counts of aggravated sexual assault; and possession of a weapon in the third degree, and was sentenced to approximately 45 years in prison.[5] Dixon eventually worked with post-conviction lawyers who encouraged retesting of biological material through use of technology that would allow DNA analysis not only of the original case evidence, but also of samples obtained during post-conviction litigation. The New Jersey State Laboratory retested the biological material, and found that Dixon could not have been the source of sperm collected from the victim - though the victim had identified Dixon's picture as that of her assailant, and had identified Dixon during the investigation and related proceedings. In 2001, Dixon was exonerated, and his convictions vacated.

In 1988, Christopher Ochoa and a fellow employee at a Pizza Hut in Austin, Texas were arrested and questioned about a murder and sexual assault. Ochoa

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5. His convictions were based on investigations by the Irvington Police Department in New Jersey. The original case against him, *State of New Jersey v. John Dixon*, was trial court no. 90-54573. Post-conviction litigation occurred in the New Jersey state courts in appeals case no. 2683-5-91.

eventually confessed, and implicated his codefendant Danziger. He agreed to plead guilty and to testify against his co-defendant. He did so, implicating himself in the sexual assault on the victim, and in her killing. Both Ochoa and his co-defendant received life sentences. Some years later, another prisoner wrote to the office of the Governor, and to the prosecution, claiming to be puzzled at the incarceration of both Ochoa and his co-defendant, since he [the other prisoner] believed he had committed the crimes for which they had been convicted. A reexamination of the pertinent physical evidence demonstrated that Ochoa was not the donor of the biological material gathered during the investigation. Ochoa was set free, having served 12 years on the sentence imposed as a result of his guilty plea.[6]

Admittedly, neither of these cases illustrates a failure of pre-plea disclosure by a prosecutor intentionally "sitting" on exculpatory evidence. However, they are examples of the recent spate of reversals, vacated convictions, or pardons, based on post-conviction review of physical evidence through new technologies. As we shall see in the next argument, however, there are reported cases in which the negotiations between the parties, and the eventual sentence imposed as a result of a negotiation, were tainted by prosecutorial withholding of impeaching evidence. The point here is relatively simple. Our system of adjudication does not 'guarantee'

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6. *State v. Ochoa* was reviewed under the title *Ex Parte Christopher Ochoa* by the Texas Court of Criminal Appeals. The trial court adjudication of post-conviction petition review occurred in January, 2001 in case 96-538-A; the Texas Court of Appeals issued its order for post-conviction relief in case 74-246.

that the accused who pleads guilty does so because he or she is indeed factually guilty – and miscarriages of justice occur.

Appellant Ruiz is not in the same situation as was John Brady. Brady had been tried, convicted of a robbery-murder, and sentenced to death before he was put on notice that his cohort Boblit had made extra-judicial statements admitting the actual killing at issue. Those statements had been in the hands of the prosecutor the whole time. *Brady*, 373 U.S. at 85. That situation impressed this Court sufficiently to issue its landmark decision.

Brady obligations cannot be limited to trial situations. In no way should the Court diminish the meaning of *Brady*, for a critical component of the *Brady* rule that applies to sentencing requires prosecutors to disclose favorable evidence to the accused before sentencing. Relieving prosecutors of the duty to provide *Brady* material when a conviction results from a guilty plea rather than a trial directly contravenes this Court's holding that the *Brady* rule applies not only to the guilt phase but also to the sentencing phase of a criminal case.

II. *Brady* Defines the Prosecution's Obligation to the Judiciary and to Individual Accuseds Concurrently, Providing an Element of Constitutional Due Process That Cannot Be Waived by the Individual Alone.

This Court's decision in *Brady v. Maryland* was clearly rooted in the notion that as a representative of the sovereign, and a member of the executive branch, the prosecutor embodies the ideal of the achievement of justice in constitutionally created and regulated courts. Indeed, as the Court reasoned its way to the rule enunciated in *Brady*, it made reference to the role prosecutors play in criminal case adjudications, going so far as to quote former Solicitor General Sobeloff's views on the Government's obligation to see that justice is done in the courts. *Brady*, 373 U.S. at 88 n. 2. The view that the prosecutor is obligated to see that justice is done had been accepted by the Court even prior to *Brady*. See, e.g., *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935). It is clear that the very ethics of the prosecutor's professional practice require that he or she adhere to the *Brady* rule rather than seek a waiver of it from an accused, especially where *Brady* material is known to exist.

In issuing its ruling in *Brady*, this Court was plainly concerned with the legal basis on which a reviewing court would have the power and ability to correct miscarriages of justice when a prosecutor has withheld certain types of material information not only from the defense but also from the adjudicative process. As the Court noted, the duty of disclosure exists "to ensure that a miscarriage of justice does not occur." *Bagley, supra*, 473 U.S. at 676. The judiciary's interest in this maintenance of

integrity occurs in part because of the recognition that:

> [T]he prosecutor's role transcends that of an adversary; he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Bagley, supra, 473 U.S. at 676 n. 6 (citing *Berger*, supra, 295 U.S. at 88).

In sum, *Brady* disclosures are required by an over-riding concern for the integrity of our adversary system. Such disclosures cannot therefore be subject to waiver. Justice Vanderbilt put it as follows:

> It is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of our courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.

Arthur T. Vanderbilt, *The Challenge of Law Reform* 4-5 (Princeton University Press 1955).

Additional support for the proposition that "*Brady* waivers" should not be legitimized comes from case law that defines the duty of disclosure as continuing through post-conviction proceedings. This Court has made it clear that the obligation of prosecutorial disclosure

follows a case through the trial court into the reviewing courts.

> [A]fter a conviction the prosecutor is also bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.

Imbler, supra, 424 U.S. at 427 n.25. See also *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992).

Indeed, the significance of certain facts in the hands of the Government may not become known until the post-conviction review. In *People v. Garcia*, 17 Cal.App.4th 1169; 22 Cal.Rptr.2d 545 (1993), a California Court of Appeal reviewed a *Brady* violation that had occurred during negotiation to resolve a case that had been tried once, reversed on appeal, and remanded. The omission alleged was a failure to disclose information material to the credibility of a government expert.

Garcia had been convicted of crimes committed in an automobile at his first trial in part on the strength of testimony by a Highway Patrol expert who had testified about speed reconstruction calculations. It was discovered by prosecutors that the expert was incorrect in his approach to these calculations in a number of cases, including Garcia's. By the time Garcia's case was remanded, prosecutors were aware that the expert "was no longer being used as an accident reconstruction expert because of faults and improper calculations." Id. at 1175. Moreover, they were aware of several cases in which the purported expert's work had been reviewed and found wanting. All of this had come to the attention of both the

trial-level and appellate-level prosecutors during an investigation into the expert's veracity. Garcia, however, was not so informed, and negotiated a stipulated sentence rather than face retrial.

After the plea and sentencing, Garcia's post-conviction counsel became aware of the depth of the problem when the information concerning the expert surfaced in other cases. He then filed for habeas relief asserting that Garcia had negotiated a settlement with prosecutorial agencies that knew full well the depth of the errors and the breadth of impeachment available, but had not honored their obligations of disclosure. They withheld the information while negotiating a deal under which Garcia would be re-sentenced and would waive further appeal or collateral attack on the conviction. Id. at 1178.

The reviewing court found that the prosecutors were aware of exculpatory evidence bearing on the credibility of the expert. The court concluded that the errors and impeachment known to the Government were central and warranted habeas relief. The court was guided by this Court's rulings, including the observation made in *Agurs, supra*, 427 U.S. at 110-11, that there are situations "in which the evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." Id. at 1181. Based on the *Brady* violation, the sentence and conviction were both vacated. Id.

Garcia is especially instructive here. On remand, Mr. Garcia was offered a settlement of his case premised on his willingness to waive his rights of review, but without waiver of the State's *Brady* obligation. Assuming,

arguendo, that such a *Brady* waiver had been exacted, the question is how the prejudicial omission of disclosure would have been addressed. *Brady* is rooted in the view that the State must avoid the presentation of falsity at trial, and encourages the avoidance of the fraudulence that occurred in *Garcia*. Essentially, the prosecutor entrapped Mr. Garcia into pleading guilty without disclosures, and permitted a sentencing court to accept a criminal case settlement, and pronounce sentence, in the absence of facts that had a bearing on the integrity of the conviction.

CONCLUSION

Given that the overwhelming majority of criminal cases nationwide are resolved through guilty pleas, one objective should be to avoid the perception, or worse yet, the reality of the derisive description of criminal courts by the controversial humorist Lenny Bruce: "In the Halls of Justice, the only justice is in the halls." *People v. Garcia*, supra, illustrates a simple point. The prosecutor's obligations of disclosure do not exist merely so that the defendant can play the game; rather, they exist to ensure the process is fair.

Respectfully submitted,

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